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THE
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CUK-H05321-45-LP2295

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VOLUME XLIX

JULY—DECEMBER, 1925.

PUBLISHED BY
MR. R. NARAYANASWAMI AIYAR, B.A., B.L.,
Vakil, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.

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LAW REPORTS*

IV.—System of Courts and Pleadings in England.

As a preliminary to the consideration of English Reports I propose, in this lecture, to give an account of the system of Courts and of pleadings in England.

The English Courts are descended from the Witanagemot or the General Council of the Saxon Kings. William the Conqueror is said to have separated its judicial from its other functions and made them over to Aula Regis or the King's Council presided over by the Chief Justiciar. The Council was composed of the chief officers of State assisted by the Justiciars and the Barons. This Court followed the King wherever he went. This was naturally very inconvenient to parties and a certain amount of devolution of duties also was felt necessary. The Court of Common Pleas was accordingly established and the Magna Carta provided that it should not be going about with the King, but must be permanently stationed at Westminster. It was so called because it had to do with Common Pleas or civil actions between subject and subject as distinguished from the pleas of the Crown or criminal cases. That Court was, according to Coke, "the lock and key of Common Law." It had exclusive jurisdiction over real actions and a concurrent jurisdiction in actions personal and mixed. It was presided over by a Chief Justice and four puisne Justices. Later on, it came to have a certain amount of appellate jurisdiction under certain statutes, *e. g.*, from the decisions of the revising barrister (under 6 & 7 Vict. c. 18) and under the Railway and Canal Traffic Act (1854).

From time to time there was further devolution and a Court of Chivalry was established by Edward I to take cog-

*The fourth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

nizance of contracts relating to deeds of arms and war over which the Constable and Marshal presided. The Steward of the Household presided over another Court constituted to regulate the King's household from which sprang the Palace Court in the time of Charles I. This was abolished in 1849. The High Steward with the barons formed the tribunal for trying peers and the right of reviewing decisions of the Lower Courts was also vested in it. This power is now vested in the House of Lords.

Similarly, the Court of Chancery, presided over by the Chancellor, issued writs under the Great Seal in all actions. The Exchequer Court managed the King's revenue. Whatever jurisdiction remained was vested in the Court of King's Bench. It was so called because in theory, the King is present at its deliberations and justice is administered by him personally. Hence the phrase *coram rege*. Its jurisdiction was high and transcendent. It kept all Courts of inferior jurisdiction within bounds. It might remove proceedings from those Courts to itself by what was called the writ of certiorari or by the writ of prohibition, prohibit their further progress in those Courts. It superintended all civil corporations by the right of the King who was the visitor. By writs of *quo warranto*, or actions in the nature of the writ of *quo warranto*, it restrained usurpation of office. By the prerogative writ of *mandamus*, it directed Magistrates and others to do their duty. It had cognizance on the Crown side of all pleas of the Crown. It protected the liberty of the subject by speedy and summary interposition with the writ of *habeas corpus* requiring any person illegally confined to be produced before it. From the duty that this Court had of keeping the Lower Courts within bounds, in (1906) 1 K. B. 32, was inferred the right to punish contempts which had a tendency to interfere with the impartial administration of justice by those Courts. " This, " said Willes, J., who delivered the judgment of the Court, " was only the exercise of the duty of seeing that they did impartial justice and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior Courts themselves, it seems to us that it is no departure from principle but only its legitimate application to a new state of things if others whose conduct tends to prevent the due performance of those duties by these Courts have to be corrected

as well as the Courts themselves." A general power to prevent abuses and oppression is claimed for this Court and Hawkins in his *Pleas of the Crown* states: "Neither is it necessary in a prosecution for any offence in this Court to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances, for this Court being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice and of dangerous consequence to the public if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it." Its civil jurisdiction was confined to actions of trespass or injury committed *vi et armis* or actions in which the defendant was an officer of the Court or was in the custody of the Marshal. It was the Court of Error from the Courts Palatinate and the Court of Appeal from the Common Pleas and Exchequer Courts under certain statutes for certain matters till the Exchequer Chamber was constituted. Till 1830, appeal lay from it to the House of Lords. By a statute of that year, appeals were made to lie from the three superior Courts of Common Law to the Exchequer Chamber consisting of the Judges of the two Courts other than the Court from which the appeal came.

The Court of Exchequer had exclusive cognizance of actions relating to debts or duties leviable from the subject. The Judges were known as Barons, the chief being known as the Chief Baron. It had concurrent equity jurisdiction with the Courts of Chancery. This work latterly became very extensive; as a result the equity jurisdiction was transferred to the Court of Chancery in 1841.

The way in which these Courts clutched at jurisdiction is an interesting chapter of English legal history. It was one of the fundamental points in the practice of the Common Law Courts that they could not decide a case in the absence of the defendant. In the Common Pleas, if the defendant did not appear on the writ, a summons would be issued. On the summons the Sheriff could order the defendant to find sureties for appearance. If he failed to secure the attendance of the defendant with that, he could distrain his lands. If that also failed, he could outlaw him after which if he appeared in public he could be arrested and brought before the Court. All this was a very laborious process and cost much. The King's Bench and the Exchequer

Courts being specially concerned with the King's business had the powerful weapon of *capias ad respondendum,* a writ directed to the Sheriff to arrest the defendant. To avail themselves of this superior process, parties went to the King's Bench pleading a wholly fictitious trespass *vi et armis* adding *ac etiam* (that is, and also) a claim in debt. It was part of the established jurisdiction of the King's Bench to regulate the affairs of all prisoners in custody of the King's officers. Once arrested for trespass, the defendant was *de facto* in the custody of the King's officers and the case would be within the competence of the King's Bench. The plaintiff had the defendant before the Court without the costly process abovementioned necessary in the Common Pleas and the Court had fresh business. It was easier still and less costly too to assume that he was already in the custody of the Court. This, no doubt, could be done only with the connivance of the Court, but the connivance of the Court being secured, (for the fees were tempting) what is called a Bill of Middlesex came to be presented instead of the original writ. It alleged that the defendant had escaped from custody and was in Middlesex or was lurking or roaming about elsewhere. On those allegations the defendant could be arrested and the trial could be continued in the King's Bench.

The Court of Exchequer improved its business by resort to the writ of *Quo minus* in which the plaintiff averred that he was the King's debtor, that the defendant owed him money and that as he did not pay, he was unable to pay the King's debt and hence the action. These allegations could not be traversed.

The Court of Common Pleas had, as I said before, exclusive jurisdiction over real actions. These actions were very technical and as such very unpopular and they were also important kinds of action which the other Courts did not like to do without. This objective was attained by the invention of the writ of ejectment or rather by its application to suits on title, which could be prosecuted in any of the Common Law Courts. It was so made applicable in the 17th Century. Originally it was only an action by a lessee for damages against any trespasser. For a long time it was his sole remedy but subsequently somewhere in the 15th century, it came to be held that he could recover the land also in that form of action. The way in which such an action was

adapted to the trial of freehold title to land was by alleging a lease to a nominal person, an entry by him and an ouster by another nominal person. It was obvious that an adjudication so arrived at would not bind the actual occupant of the land. The Court accordingly insisted on notice being given to the person in occupation also and gave the latter leave to defend on terms, viz., on his " confessing the lease, entry and ouster. " Thus what ostensibly was an action by Doe, the fictitious lessee against the fictitious intruder *Roe* became an action by the real owner of the freehold against the person actually in occupation in which the whole title was gone into. The Court of Common Pleas could not see its business thus taken away by the other Courts without making some attempt to get part of their work. This was done by adding to every sort of action a claim of debt *'ac etiam'* which enabled it to secure the arrest of the defendant by what was called a mesne process. By legislation, the power of arrest on mesne process was extended to the actions of detinue and replevin in 1352, and to action on the case in 1503 which, by that time, included all actions on contracts. Thus all the Courts came to acquire practically identical jurisdiction with powers of arresting on mesne process.

The origin of the Chancery Courts is wrapped up in great obscurity and various theories of its origin have been suggested. One theory is that the Lord Chancellor exercised the residuum of power that remained in the Council after the distribution of some of it as set forth above between the various Common Law Courts by which he dispensed justice in cases not remediable by the ordinary law Courts. According to others, the Chancellor being in charge of the work of issuing original writs, whenever he found that proper remedy was not available by the ordinary writs he retained the case for trial before himself. According to others again, his jurisdiction arose from the practice of referring petitions presented to the King for the exercise of his grace to the Chancellor. As representing the superior residuum power, the Chancellor used to be called " the foot and basis of the civil jurisdiction of Courts. " The jurisdiction of Chancery was established and was in full operation during the reign of Richard II. From the records recently published it seems to be clear that in the early times the principal business of this Court was not *uses* but interference in case of trespass, assault, etc., in which parties could not get redress in the Common Law Courts owing

to the power and influence of the defendant. The invention of the writ of subpœna by Waltham, Bishop of Salisbury, in the reign of Richard II gave increased efficiency to the Court. The introduction of uses and trusts at a later period gave it fresh scope for activity. The Chancellor's Court had certain advantage over the Common Law Courts. The Common Law Courts could not issue an injunction and could not direct specific performance. They could not order discovery, or issue interrogatories or examine parties. The Chancery Courts could do all these things. The technicalities of pleading of the Common Law Courts were unknown to them. There the action commenced not with a writ but with a bill or complaint setting forth all the facts on which the Chancellor was asked to do justice. There was great jealousy between the Common Law Courts and the Chancery Court and matters came to a head in James I's time during the Chancellorship of Lord Ellesmere when the question was raised whether the Equity Court could give relief after a decree was passed in the Common Law Courts. Coke was then the Chief Justice of the King's Bench. The King pronounced in favour of the jurisdiction. Lord Bacon, who succeeded Lord Ellesmere, reduced the equity practice into a regular system but did not sit long enough to effect any great change. His successors did little to improve it till we come to the time of Lord Nottingham who was appointed Chancellor in 1673. He was a great lawyer and built up equity jurisprudence on wide and rational foundations. He is called the Father of Equity. But it was during the time of Hardwicke that the most substantial additions to the equity law were made. The successive catchwords of the Chancellors' equitable jurisdiction supply the best key to a historical explanation of the equity doctrines at various times. It was at first regarded as a matter of grace and next as a matter of conscience. The first contributed the idea that the remedy was *discretionary.* From the second arose the theory that equity operated in personam and it was also responsible for the growth of many ideas as to trust and for the practice of granting relief on various grounds of fraud not taken cognizance of by the Courts of Common Law. Nottingham and Hardwicke added another idea—equality, that equality is equity which was made use of specially in the administration of the estates of deceased persons. By reason of the more efficacious remedies possessed by

the Chancery, questions relating to administration were taken to the Equity Courts in preference to the Common Law Courts.

From the time of Henry VIII, the Chancellor had the assistance of the Master of the Rolls in administering equity. He was originally only the chief of the Masters in Chancery. Cardinal Wolsey was the first to devolve judicial duties on him. In the 19th Century the work of Chancery increased and it was found necessary to appoint Vice-Chancellors also. That was by 53 Geo. III, c. 24 (1813). In 1842, when equity jurisdiction was transferred from Exchequer Court two more Vice-Chancellors were appointed to do the increased work. There was great delay in Chancery which is well caricatured by Dickens in *Bleak House,* no doubt partly due to the great amount of work that fell to be done by these Courts. The methods of Chancery also were partly responsible for it. First, there was a hearing before the Master of the Rolls or the Vice-Chancellor and then a re-hearing before him and then an appeal to the Chancellor, then a re-hearing before him and finally an appeal to the House of Lords. After 1851, the Appeal Court consisting of Lord Chancellor and two Lords Justices heard appeals from the Master of Rolls and the Vice-Chancellors and from thence the appeal lay to the House of Lords. The Lord Chancellor had, in addition to the jurisdiction referred to above, the right of supervision over all charters, letters patent and such other public instruments. He was the visitor in the right of the Crown of all hospitals and colleges of Royal foundation. He was the guardian of infants and lunatics.

Matrimonial and testamentary jurisdiction was originally exercised only by ecclesiastical authorities, that is to say, the Bishop and the Archbishop. During the Commonwealth, much of the work done by these was done by the ordinary Courts. After Restoration, though most of the work they used to do previously did not come back to them, matrimonial and testamentary work did and it continued to be done by them till 1857. In that year the Court of Probate was created to exercise jurisdiction in relation to the granting and revoking of probate and letters of administration. It possessed the same powers throughout England as

the Prerogative Court of the Archbishop of Canterbury. From the Probate Court, the appeal lay to the House of Lords. In the same year, a Court for Divorce and Matrimonial Causes was also established to exercise the jurisdiction hitherto vested in Ecclesiastical Courts in matters of matrimonial as well as the jurisdiction newly created by that Act. The Lord Chancellor, the Chief Justices and the senior puisne Judges of the three Common Law Courts, together with the Judge of the Probate Court styled the "Judge ordinary," were its Judges. From the "Judge ordinary" appeal lay to the full Court.

Justice was described by an Admiralty Judge of the 17th Century as having two wings, one of which spread itself over the land and the other (the Admiralty Court) over the water. It was originally the Court of the Lord High Admiral exercising jurisdiction through his deputy over maritime causes arising on the High Seas not being within the jurisdiction of any of the Common Law Courts. It was a Court of high antiquity, dating it is said, from the time of Richard I, but certainly from the time of Edward III. It was a Court of limited jurisdiction liable to prohibition from the Common Law Courts. They checked by that means the propensity of that Court like other Courts to extend its jurisdiction. The Common Law Courts themselves acquired some jurisdiction over matters within the jurisdiction of the Admiralty Court by permitting the plaintiff to feign that the contract though made on the High Seas was made in some county within the jurisdiction of the Common Law Courts. This Court came into prominence during the Napoleonic wars owing to the large amount of Prize Work it had to do. In 1798, when Lord Stowell was appointed to the Court it attracted very considerable attention. In 1840, the Admiralty Courts Act was passed, which reconstituted the High Court of Admiralty. Its jurisdiction was further extended by the Admiralty Courts Act, 1861, and the Merchant Shipping Acts. Appeals lay from this Court to the Privy Council. The law administered by this Court was not the "ordinary Municipal Law of the country but the law which the English Court of Admiralty either by Act of Parliament or by re-iterated decisions and traditions and principles has adopted as the English Maritime Law." It is derived from various sources,—the laws of Oleron, the Digest and the ordinances. Prior to the Naval Prize Act, 1864,

jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The Court was commissioned to try cases before it according to the course of admiralty and the law of nations. In (1916) 2 A. C. 77 a question arose as to how far the Crown had power to alter or prescribe by orders in Council the law the Prize Court had to administer. It was held by the Privy Council that it had no such power.

Sittings in *Banc* (or Bench) of the various Courts were before the coming into operation of the Judicature Acts held at Westminster. Such sittings were distinguished from single Judge sittings in Chancery, Bankruptcy, Admiralty or Divorce Courts or in the Assizes. Three Judges constituted the Court and for the most part questions of law and applications for new trials were dealt with by it. The work included in the case of King's Bench regulation of criminal proceedings. It dealt with special cases and demurrers and also regulated the practice of Courts. The Judges sat by rotation, the Chief Justice presiding.Sometimes one Judge alone sat for justifying bail, discharging insolvent debtors, administering oaths, deciding on matters of motion and for even making rules with the same force and value as might be done by the Court in *Banc* till set aside by the latter. These sittings took place in what was called *Bail Court*. The business of the Court in *Banc* was transferred to the Divisional Court by the Judicature Act of 1873. By S. 17 of the Appellate Jurisdiction Act, 1876, every action and proceeding in the High Court and all business arising out of the same should be tried by a single Judge. Appeals from a single Judge in all matters of practice and procedure as well as judgments in action and proceedings lie to the Court of Appeal. What appellate work still remains is done by the Divisional Court.

The Assize and Nisi Prius Courts acted as auxiliaries to the Court as such. All they did was to try questions of fact submitted to them and to return the findings of the jury whereupon the Court would proceed to give judgment or to hear the parties further on the question—for whom judgment was to be given. These issues of fact had to be tried at Westminster unless *nisi prius, i. e., unless before that time,* the Justices themselves went into the counties in which case these issues were tried locally with the jury.

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DEPARTMENT OF LAW

The first rude foundation of the Bankruptcy Law was laid by the statute, 34 & 35 Henry VIII, c. 4. It was directed against the fraudulent debtor. The Lord Chancellor, the Lord Treasurer, the Chief Justices of either Bench and Judges of the Privy Council were empowered by the Act to take the offender's lands, and to sell them for the satisfaction of the creditor's rate and rate alike. 13 Eliz. c. 7 was aimed at voluntary settlement. By 7 George I, c. 31 debts payable in the future are made provable in Bankruptcy. 1 & 2 William IV, c. 56 first introduced the Court of Bankruptcy and the Official Assignee.

For a long time only traders were entitled to the privileges of bankruptcy. After a series of Acts commencing in 1813 designed for the protection of honest but insolvent debtors, finally came the Bankruptcy Act of 1861, which extended the relief of bankruptcy to non-traders as well. After a great deal of experimenting the legislature in 1883 adopted official-administration accompanied by consultation with creditors "The estate for the creditors" is its motto not for the debtor nor for the trustee. It has also a disciplinary character; it inculcates and enforces a high standard of commercial morality. In 1825, a Court of Bankruptcy with a Chief and 3 puisne Judges was established of whom 3 were to act as a Court of Review or Appeal with a staff of subordinate commissioners acting under the fiat of the Court. In 1847, the Court was abolished and its jurisdiction was transferred to a Vice-Chancellor to be designated by the Lord Chancellor for the purpose. On the establishment of the Court of Appeal in Chancery the Appellate Jurisdiction in Bankruptcy was transferred to that Court. In 1869, a Court known as the London Court of Bankruptcy was established as a principal Court of Record. It was a Court of Equity as well as of law having jurisdiction in the metropolis and the Chief Judge possessed all the jurisdiction of a Judge of one of the superior Courts of Common Law and of a Judge of the High Court of Chancery in addition to the special jurisdiction in Bankruptcy.

The multiplicity of Courts and procedure led to the greatest confusion. The commissioners appointed in 1869 recommended their fusion and as a result, in 1873, the several Courts were united and consolidated into one Supreme Court of Judicature, consisting of the Lord Chancellor, the Lord Chief Justice of England, the Lord Chief Justice of Common Pleas,

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the Chief Baron of Exchequer, the puisne Judges and the Barons, the Master of the Rolls and the Judge of the High Court of Admiralty. All these had to possess equal power, authority and jurisdiction. To make the transition easy, the Court worked in five divisions. (i) Queen's Bench, (ii) Common Pleas, (iii) Exchequer, (iv) Probate, Divorce and Admiralty, (v) Chancery Divisions. As the old Judges died out, in 1880, the offices of the Chief Justice of the Common Pleas and the Chief Baron of Exchequer were abolished and the Courts of Queen's Bench, Common Pleas, and Exchequer were consolidated into one, the Queen's Bench Division. Both the Lord Chancellor and the Master of the Rolls ceased to be ordinary Judges of the Supreme Court subsequently.

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A Court of Appeal was one of the things strongly recommended by the commission. The Court of Appeal so constituted consisted of the Lord Chancellor, ex-Lord Chancellors, the Lord Chief Justice, the Master of the Rolls and the President of the Probate, Divorce and Admiralty and of a certain number of ordinary Judges known as Lord Justices. In the Court of Appeal was vested the appellate jurisdiction of the Lord Chancellor, the Court of Appeal in Chancery and Bankruptcy, the Court of Exchequer Chamber and of the Judicial Committee in appeals from Admiralty. In Admiralty matters, however, so far as Prize Courts go, the appeal still lies to the Privy Council. From the Court of Appeal appeals lie to the House of Lords. The Court of Appeal has original jurisdiction in certain matters in which the Lord Chancellor had jurisdiction like lunacy.

The Privy Council was the permanent council of the King composed of the principal officers of State—the Lord Chancellor, the Justiciar, the Lord Treasurer and two Archbishops. It exercised legislative, executive and judicial functions. After the establishment of the Courts of Common Law, petitions used to be presented to the King in Council especially in cases where the Courts were likely to be intimidated by a powerful defendant. If such a petition raised a question of law it was usually referred to the Chancellor and out of this practice grew the Chancery jurisdiction. But the King still claimed wide jurisdiction and it was a committee of this council which acted as Star Chamber. The Chamber was abolished in 1640; since then, the Council

has not acted as an original Court. The Act of 1640 did not take away the appellate jurisdiction. The English subjects of the King used to go to the King in Parliament and in course of time the House of Lords was recognised as the Court of Appeal, but the King's Council remained the Court of Appeal for the King's subjects abroad. Down to 1833, appeals to the King in Council were few and were heard by Committees specially appointed. In that year, under 3 & 4 William IV, c. 41, a Judicial Committee was constituted. It consists of all the members of the Privy Council holding or having held the office of Lord President or Lord Chancellor or any of the high judicial offices mentioned in the Appellate Jurisdiction Acts of 1876 and 1887, that is to say, the Lords of Appeal in ordinary, the Judges of the Supreme Courts of England or Ireland or the Court of Session in Scotland. By the Act of 1833, the King was authorised to appoint any two other persons being Privy Councillors, who have held the office of a Judge in the East Indies or in any of His Majesty's Dominions beyond seas. By 58 and 59 Vic. c. 44 it was enacted that Judges of certain Colonies should if members of the Privy Council be members of the Committee. In 1897, the Chief Justices of Canada, Cape Colony and South Australia were swomer of the Council and became members of the Committee. In cases arising under the Clergy Discipline Acts, the Committee is assisted by three bishops acting as ecclesiastical assessors. In appeals from Colonial Admiralty Courts, they are assisted by two nautical assessors. These assessors are not responsible for the judgment.

There is an appeal to the Privy Council in criminal cases also with special leave. As Viscount Haldane said, in 44 Cal. 876 : 44 I. A. 137, "The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it had not led to injustice of a grave character. Error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error, for

example, may deprive a man of a constitutional or statutory right to be tried by a jury or by some particular tribunal or it may be caused to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed." *See* 12 A. C. 459, 41 C. 568, 21 M. L. J. 374 and 26 M. L. J. 621. In 36 M. 501, where inadmissible evidence was admitted and there was not enough other evidence to support the conviction, their Lordships interfered. The judgment takes the form of a report to His Majesty ; if there is any difference of opinion, the report embodies the views of the majority alone and the dissenting opinions are withheld. In 2 P. D. 276, Kelly, C. B. claimed the right to let it be known that he differed, but an order in Council ruled to the contrary.

There is an appeal to the King in Council from the highest Civil Court of each separate colony or province sometimes as of right and sometimes on leave taken. Appeals from Consular Courts lie to it. Under the Naval Prize Act, appeals from the Prize Court lie to it. Under various Acts, appeals from Ecclesiastical Courts also lie to it. Appeals lie to it from all the highest Courts of the Empire unless that right is expressly taken away. Now that the Irish Free State is constituted as a separate entity, appeals from that State lie to the King in Council and not to the House of Lords.

The House of Lords has both original and appellate jurisdiction. Original jurisdiction it has in the trial of Peers for treason, felony or misprison and in the matter of impeachment of a commoner or Peer. Claims to peerages are tried by the House through a Committee of Privileges. It also tries controverted questions of election of Peers and contempt cases, *i. e.*, contempt of its own authority.

Appeals lie to the House of Lords from the judgment of the Court of Appeal in England or of any Court of Scotland or Ireland from which an error or appeal lay to the House of Lords by common law or statute. An appeal also lies from the Court of Criminal Appeal on the certificate of the Attorney-General. The lay Peers have, strictly speaking, the same right to vote on judicial questions as they have on other questions. But since 1883, no lay Peer has attempted to exercise it. No appeal can be heard unless any three of the following are present—the Lord Chancellor, the Lords of Appeal in ordinary, and such Peers of Parliament as have held high judicial office, *i. e.*, that of Lord Chancellor, paid

Judges of the Judicial Committee, the Judges of the Supreme Court of England or Ireland or the Court of Session. The Lord Chancellor, if present, presides.

In criminal cases, till we come to recent statutes, there was no appeal. A writ of error lay to the King's Bench Division from all inferior criminal jurisdictions. Error might be brought for mistakes in indictment as when an offence is improperly or insufficiently described therein or in the judgment or other parts of the record. Writs of error in case of misdemeanour were not allowed as a matter of course, but only on probable cause being shown to the Attorney-General. The King's Bench Judge trying a case might reserve a point for the consideration of all the Judges respiting sentence or postponing judgment. In the case of misdemeanours, tried by a special order on the *nisi prius* side, a new trial might be moved for or obtained as in civil cases. Under the Crown Cases Act, 1848, the Judge at a trial under commission of oyer and terminer or of gaol delivery or the Justices at Quarter Sessions, had a discretion to reserve any point of law. Such a point of law was argued before a Court consisting of five or more Judges of whom the Lord Chief Justice had to be one. By an Act of 1907, a Court of Criminal Appeal is constituted, of which the Lord Chief Justice and all the puisne Judges are Judges. Appeals should be heard by not less than three. Appeals lie on questions of law as a matter of right ; on questions of fact or mixed questions of fact and law by leave of the Judge who tried the case or of the Court of Appeal—on sentence alone by leave of the Court of Appeal. The Court of Appeal takes the place of the Court of Crown Cases reserved.

The rules of pleading play such an important part in the English Law and are so much mixed up in the determination of substantive law that a failure to bear in mind the rules as to pleadings might give a wholly false impression of the legal value of a precedent. These rules were framed in the days of Plantagenets and continued the same till the Common Law Procedure Acts and the Judicature Acts revolutionised the procedure by a system of simple and straightforward pleadings. The practical utility of the rules of pleadings had been seriously impaired by the over-subtlety of pleaders and by the rigour with which the Courts applied the rules.

Pleadings were oral till the time of Edward III when the rule was made that they should be in writing. The plead-

ings used to be entered in the rolls of the Court. In the time of Edward IV the practice of exchanging pleadings before entering them on the rolls came into vogue. At Common Law, the usual method of starting an action was by an original writ. After the writ was issued, the plaintiff had to file a statement of his claim which was called a *conte* or count. If there should be any variance between the writ and the *conte*, the suit failed. Defendant's reply to the plaintiff's claim was called a *plea*. If plaintiff took exception to the plea, that was called a reply. Defendant's answer to it would be a rejoinder. The pleadings might be continued by a sur-rejoinder of the plaintiff. Defendant's further reply to it would be sur-rebutter and so it would merrily go on. Plaintiff had to state the facts on which his cause of action depended. Each cause of action had to be separately stated, but number of such causes of action could be combined provided different kinds of action were not combined in the process. If one count disclosed two causes of action, it was bad for doubleness or duplicity. The facts proved at the trial should not vary with the facts stated. If there was a variance, the action failed, the Court having no power to amend. There were seven classes of personal actions, three in contract, *viz.*, debt, covenant and assumpsit and four in tort, *viz.*, detinue, trespass, trespass on the case and replevin. One kind of action could not be combined with another till 1852 when the Common Law Procedure Act provided that causes of action might be combined provided they were between the same parties. Each plea had to be a complete answer to each count. Any plea which gave two answers to one count was bad for duplicity. Any plea which was inconsistent with itself was bad for inconsistency but it might be inconsistent with another plea. Pleas were of two kinds, dilatory pleas and pleas in bar. Dilatory pleas were pleas of jurisdiction or in abatement. The latter applied where there was an objection like non-joinder of parties. Pleas in bar were those that went to the merits. There were general traverses, that is, a general denial like not *guilty, non est factum* and common traverses, that is, a specific denial of facts. Pleas in confession and avoidance were pleas in justification or excuse or discharge. Estoppel was another kind of plea. Demurrer was a plea which, for purposes of the plea, admitted the matters of fact alleged but denied their sufficiency in law to support the claim. Till the

Common Law Procedure Act, 1852, a party could not plead as well as demur to the same pleading. All these complicated rules of pleading did not make for clearness. Each party was bound no doubt to state the points he wanted to raise with precision. Nevertheless all the other side would know is that plaintiff would prove certain set of facts which would sustain the legal conclusion. Plaintiff might, for instance, sue for money received by the defendant for plaintiff's use. A claim of that sort could be sustained in half a dozen ways. It was not necessary for the plaintiff to say in which one of those ways he was going to sustain the action. Similarly with the defence. In an action for goods sold and delivered the defendant might simply plead that he was never indebted as alleged. He need say no more in his pleading. He might give evidence at the trial either that the goods were not ordered, or that they were not delivered or that credit has been given or that the contract was bad for want of writing under the Statute of Frauds. To mitigate the defects of the Jury system which had come to be the prevailing method of trial of questions of fact, it also became usual in certain forms of action to have recourse to a process known as *color* by which, by the narrating of a fictitious story, the issue of fact was converted into an issue of law. It was so called because by giving the plaintiff the show or color of a title inferior to himself and asking the judgment of the Court, the general issue was avoided. Till the time of George II, no set-off could be pleaded at law but even after the statute (2 George II, c. 22) it could be pleaded only where claims on both sides were liquidated demands.

Some of those defects were removed by the Common Law Procedure Act. The venerable technical rules as to joinder of parties and claims, abatement of writs, fictitious averments in pleadings, "color," inconsistent pleas and as to including several matters in one plea were all abolished. Actions were to be commenced with a simple writ of summons. The action of ejectment was simplified. Courts were given unlimited power of amendment.

The Chancery pleadings, also, though elaborate, were less technical and had more regard for substance. All actions in Chancery began with bills. The facilities for discovery, interrogatories, made parties more aware of the facts that they had to prove or disprove.

The Judicature Act made a thorough change in the law of pleadings. It abolished forms of action. It compelled parties to state facts on which they sought relief and not merely conclusions of law. The general issue was abolished. So also demurrers. The party could formerly insist upon his demurrer being separately argued. It is only by order of Court or by consent of parties that it can be argued separately now. Equitable pleas and defences can be raised now in common law actions and effect given to them. Large powers of counter-claiming also are given. A third party procedure has been introduced, that is to say, third parties might be brought in as defendants against whom indemnity or contribution is claimed by the defendant and decree given against them. The very names of pleadings are changed. On some of these points it will be found that the English Procedure is in advance of the Indian.

As regards appeal, there was a difference in the point of view of Common Law and Chancery. At Common Law, an appeal lay by way of error, on matters of law apparent on the face of the proceedings. The party aggrieved had to sue out of Chancery a writ in error which directed the Chief Justice or Chief Baron or the Judge of the inferior Court concerned to send a manuscript of the record to the Appellate Court. In 1852 a simpler method was substituted of alleging errors in the statement of grounds of appeal served on the other side so as to supersede execution until default in bail or affirmance of judgment or until the proceedings are otherwise disposed of. The mode of appealing from decrees in equity was by an application for re-hearing. The theory of appeal accepted by the Judicature Act is the Chancery view of re-hearing.

SUMMARY OF ENGLISH CASES.

ATHERTON *v.* BRITISH INSULATED AND HELSBY CABLES, LIMITED, (1925) 1 K.B. 421 : 94 L J K. B. 319.

Income-tax—Company—Profits—Lump sum set apart to start pension fund—If a deduction—"Wholly or exclusively laid out or expended for trade, profession, employment or vocation"—Income-tax Act, 1918, *Sch. II.*

A company which was not giving pension to its employees decided to start a pension fund, as otherwise experienced em-

ployees were leaving it for more lucrative service elsewhere. Under the pension scheme, each employee of less than a certain age was to pay 5 per cent of his pay, and the company was to add half as much. As the scheme was to be brought into force at once, and there were people who would claim a pension soon though not contributing anything on account of the rules relating to age, the company paid out of its profits a lump sum of money to provide such pensions before the scheme became self-supporting. They claimed to deduct this amount for purposes of income-tax. *Held*, reversing the decision of Rowlatt, J. it was not money "wholly or exclusively laid out or expended for trade, profession, employment or vocation" and as such was not a proper item of deduction. (1919) 1 K. B.25 distinguished.

INLAND REVENUE COMMISSIONERS *v.* FISHER'S EXECUTORS, (1925) 1 K B 451 : 94 L J K B 310.

Income-tax—Company—Shareholder—Distribution of profits in the form of debenture stock—Capital or income—Finance Act, 1910, *S.* 66.

A company having a large amount of undivided profits issued to its ordinary shareholders debenture stock in respect of these profits, one of the terms of issue being that the ordinary shareholders should buy out the preference shareholders. The recipients had no option to receive anything in cash. One such shareholder was sought to be made liable for super-tax in respect of these debenture shares. *Held*, reversing the decision of Rowlatt, J., the receipt of debentures cannot be considered as income in the hands of the shareholder and as such there was no liability to pay tax thereon. (1921) 2 A. C. 171 applied.

LAPISH *v.* BRAITHWAITE, (1925) 1 K. B. 474.

Municipal Council—Disqualification—Share or interest in contract—Exemption re *shareholders—Managing Director—Position of—Municipal Corporation Act,* 1882, *S.* 12.

Under S. 12 of the Municipal Corporation Act, a person is disqualified to be a councillor if he has directly or indirectly any share or interest in any contract with the Council, but an exemption is made of persons having a share or interest in any company under the Companies Act. *B* was the managing

director and a shareholder of a company which supplied materials to a Corporation and he acted as councillor while the contract was running. The question arose whether he had rendered himself liable for the penal consequences of violating R. 12. *Held,* by the majority of the Court of Appeal (Atkin, L. J. dissenting) apart from being a shareholder, a managing director was not directly or indirectly interested in the contract and as he was exempted in his capacity of shareholder, he was not liable for the penal consequences. The policy underlying disqualification discussed.

BACK *v.* DANIELS, (1925) 1 K. B. 526 : 94 L. J. K. B. 304.

Income-tax—Land—Occupation of—Lease to potato growers—Profits made by lessees by sale—Basis of taxation—Income-tax Act, 1918, *Schs. B and D.*

Certain potato merchants hired lands for growing potatoes, according to which the owner was to get rent and provide manure, labour, etc. They sold the potatoes and made profits. *Held,* affirming the decision in (1924) 2 K B 432 they were liable to pay tax as occupiers under Sch. B of the Income-tax Act.

KNIGHT *v.* PONSONBY, (1925) 1 K. B. 545 : 94 L. J. K. B. 336.

Practice—Security for costs—Poverty of plaintiff—Change of residence on account of poverty.

An order for security for costs is always refused where the ground alleged is poverty. If owing to poverty a plaintiff has no permanent residence but he neither misdescribes nor conceals his residence, a Court should not order security from him.

SPENCER *v.* ASHWORTH PARTINGTON AND CO., (1925) 1 K. B. 589 : 94 L. J. K. B. 447.

Company—Shares—Sale—Transfer in blank—Vendor's liability to indemnify—Implied contract.

Where the holder of shares in a Company sells them and delivers to the purchaser a transfer in blank, the purchaser is liable to indemnify the vendor against calls made on the shares

after the purchaser has re-sold them and passed on the transfer to a sub-purchaser. There arises in such a case an implied undertaking by the purchaser to indemnify the vendor against all calls that may be made upon him in respect of the shares at any future date, whether made while the purchaser remains beneficially interested in them or after he has parted with them. *Humble* v. *Langston*, 7 M. & W. 517 overruled.

KEY *v.* BASTIAN, (1925) 1 K. B. 650 : 94 L. J. K. B. 428.

Criminal Law—Printing matter without name and address of printer—Prosecution—Fiat of Attorney-General—Summons and information to be laid in Attorney-General's name—Omission—Effect of.

Under 33 and 34 Vict. c. 24 a printer who does not indicate on any matter printed by him, his name and address is liable to be prosecuted " in the name of H. M. Attorney-General or Solicitor-General. " *Held,* the provision that the prosecution should be in the name of one of the Law Officers of the Crown was a condition precedent and when the summons did not show on its face that the prosecution was in the name of the Attorney-General or Solicitor-General, the whole proceedings are null and void, even though there was in fact the fiat of the Attorney-General prior to the launching of the prosecution. Where prosecution has been started in the name of some one else, the defect cannot be cured by afterwards adding the name of the Attorney-General.

HEATON AND DUGARD, LTD. *v.* CUTTING BROTHERS, LTD., (1925) 1 K. B. 655.

Company—Debenture holders—Rights of—Money paid by Director to avoid execution—Receiver—If can get from Sheriff.

In execution of a money decree against a Company, the Sheriff went into possession. To avoid a sale, the managing director paid the decree amount. While the money still remained in the hands of the Sheriff, the debenture holders who had a floating charge over the property of the Company appointed a Receiver, who claimed back the money from the Sheriff. *Held,* he was not entitled to claim it.

ILFORD URBAN DISTRICT COUNCIL *v.* BEAL AND JUDD, (1925) 1 K. B. 671 : 94 L. J. K. B. 402.

Landowner—Liability—Sewer beneath land—Ignorance of its presence—Effect of.

Where as a result of the acts or omissions of an owner of land, sewer lying underneath is damaged, he is not liable for the same if he did not know of its existence and could not reasonably be expected to know it.

THE MEANDROS, (1925) P. 61.

Shipping—Salvage—Vessel requisitioned by Government—Benefit—Liability of owner.

A ship, which had been requisitioned by the Greek Government, was stranded while in their hands and was saved by the services of the plaintiffs' salvage ship. During the period of the requisition, possession and control were with the Greek Government, but the property remained in the owners. In an action for salvage claims against the owners after the Greek Government had returned the ship, *held,* they were liable to pay.

LOCKETT *v.* NORMAN-WRIGHT, (1925) 1 Ch. 56 : 94 L. J. Ch. 123.

Contract—Specific performance—Lease "subject to arrangements between solicitors"—Conditional agreement.

The defendant who wanted to take a lease of the suit premises had some preliminary interviews with his landlord, and finally wrote to him he was prepared to take the same "subject to suitable agreements being arrived at between your solicitors and mine." Certain repairs were to be effected to the tenant's satisfaction and the latter being dissatisfied as to the same refused to proceed further, whereupon he was sued for specific performance. *Held,* the letter was not an unconditional acceptance of any previous offer, and the execution of a suitable agreement by the solicitors of both parties was a condition of any concluded bargain. There being no concluded contract, the action was not maintainable. (1921) 1 Ch. 57 ; 291 ; (1924) 1 Ch. 97 followed.

In re COMBE : COMBE *v.* COMBE, (1925) 1 Ch. 211.

Will—Power of appointment—No gift over if power is not exercised—Effect—Intestacy.

Under the will of a testator his wife and only son were appointed executors ; the income was to be paid to his widow during her life and on her death or re-marriage to his son for life and thereafter to any relation of the testator of the whole blood whom the son appoints by will. There was no gift over in default of appointment. *Held,* as the testator did not show any intention to create a trust in favour of the objects of the power, after the two life interests created, the property would go as an intestacy if the son released his power of appointment.

There is no inflexible and artificial rule of construction to the effect that where a power of appointment to a class is not followed by any gift in default of appointment, the Court is bound to imply a gift to that class in default of the exercise of the power.

JOTTINGS AND CUTTINGS

Costly Litigation.—The outcry, in various quarters, against the excessive cost of litigation is not unwarranted, whether it refers to the expenditure of tens of thousands of pounds on a society *cause celebre,* or "to an action in the County Court to recover £66," upon losing which the plaintiff, in addition to his own costs, was faced with "a bill of the defendant's taxed costs amounting to £57-11-4." The criers out, however, almost invariably fail to address themselves to the problem with any sort of reasonableness, and little useful purpose is served by their discussions. It might be remembered, for example, that the action to recover the £66 above referred to, very probably involved the same expenditure of time and trouble, for the defendant's legal adviser, as would a claim of the same nature for £660, and it may well be that litigants were not altogether blameless in the matter, who elected to incur a joint expense of over £100 to compose a £66 quarrel. A first step to solving the problem of providing a fair means of litigating very small, but inevitable, disputes is that the prospective clients should be as considerate of the lawyers' difficulties as the lawyers are expected to be of the clients'. The protest against costly litigation which we have before us, but which we will not

identify, embarks on a diatribe not only against all lawyers, but against all professional men. Dealing with speculative debt collectors, it says : " Their clients largely consist of members of the medical profession, who do not think it undignified to hand over their defaulting patients to the tender mercies of men who will stop at nothing, even to the wrecking of homes, to extort payment." Everyone knows how many bad debts doctors incur, and how rarely they dare, or care, "to extort payment." If our protestor regards "litigation" as "costly" because it compels him to pay his bills, especially his doctors' bills, then we mav go so far as to retort : " the costlier, the better."

—*The Law Journal*, April 18, 1925, p. 363.

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Defending the Guilty.—An old controversy is revived in Judge Bowen Rowland's reminiscences : Should an advocate defend a man whom he knows to be guilty ? The Liverpool *Daily Post* observes that a precedent is to be found in the decision of Courvoisier's counsel, approved by Baron Parke, to continue their defence of Courvoisier notwithstanding the latter's private admission that he had murdered his master, Lord William Russell. A Welwyn Garden City paper, the *Pilot*, expresses horror at the approval given to such a decision by Hawkins, J., and observes that lawyers, if they in general agree with that approval, deserve the worst that is ever said of them; and there is no doubt that many laymen are of the same way of thinking. Yet Hawkins, J., it is submitted, was obviously right and merely gave utterance to what is a fundamental rule of the profession. Indeed, it is within the experience of most of us that a Judge has ordered a case to be tried out notwithstanding that the accused has tendered from the dock a plea of guilt, and counsel has been requested to undertake the defence. The principle is an elementary one to lawyers, that every subject is entitled to have his case argued and is entitled to demand of the advocate, whom he selects, that this advocate should state his case in the most favourable way possible and should not assume, uninvited, the attributes of the Judge or the Jury. If the client is so unhelpful as to state, rightly or wrongly, that he is guilty, then the advocate may not call him as a witness of his own innocence, but must confine him self to the putting of the prosecution to strict proof. Even in the rare and extreme case when the advocate is thus embarrassed, no serious damage is done to the cause of justice,

which is adequately represented by others, who may be relied upon to note the fact that the accused person maintains a non-committal silence. It is a principle, universally and gladly accepted, that every man is presumed to be innocent until his guilt is proved. How comes it, then, that so many intelligent people are amazed that advocates make it their first duty to act upon that principle ?

—*The Law Journal*, April 25, 1925, p. 386.

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An Idol's Next Friend.—The Judicial Committee is, as we all know, a very interesting tribunal. Whether the Supreme Court of the United States, or the Judicial Committee, is the greatest Court in the world is matter of opinion, but no doubt when the Permanent Court of International Justice gets really to work it will have the premier place. The Judicial Committee is mainly interesting for the variety, and may we say from our insular point of view, the oddity of the questions that come before it. In the case of *Mullich* v. *Mullich* (*Times*, 29 ult.)—we have shortened the title—it has had to consider a provision in a will for the maintenance of an idol, and, without turning a hair, so to speak, it has directed that the idol should appear by a disinterested next friend appointed by the Court. That, no doubt, is all right, for as Lord Shaw, in delivering the judgment of the Committee said: "A Hindu idol is—according to long-established authority, founded upon the religious customs of the Hindus and the recognition thereof by Courts of Law—a 'juristic entity.' It has a juridical status, with the power of suing and being sued." A *dictum* which illustrates the wide tolerance of the British Empire.

—*The Law Journal*, May 2, 1925, p. 410.

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Indian Idols and the Privy Council.—We referred last week to the doctrine of Indian Law applied in the judgment of the Judicial Committee delivered by Lord Shaw in *Mullich* v. *Mullich* (*Times*, 29th ult.), that an idol is a juristic entity. It may be interesting to note that Lord Shaw himself had already given this as an example of the wide jurisdiction of that tribunal, and how all the law it administers is founded ultimately on Honesty: the *honeste vivere*, indeed, which Ulpian long ago laid down as the first precept of the law. This was in *The Law of the Kinsmen*, published three years ago, containing Lord Shaw's addresses on "The Widening Range of

Law" and "Law as a Link of Empire," the one to the American Bar Association, the other to the Canadian Bar Association. In the latter, describing the work of the Judicial Committee, he said:

"The very gods of India are juristic entities. They are the legitimate donees of vast endowments. Their properties and possessions are respected and protected. Each god, through the officers of his temple or the manager of religious endowments, educational endowments or sacred places, has a right and title to sue. . . It is the arraignment of the faithless by the faithful, and it is the glory of laws to interpose for the simplest of reasons, namely, that honesty is at stake."

So last week Lord Shaw was on quite familiar and, indeed, congenial ground.

—*The Law Journal*, May 9, 1925, p. 430.

The Adoption of Children.—For some years now there has been a growing feeling that it is high time that the legal position with regard to the adoption of children should be put upon a proper basis. It is, perhaps, at the moment hardly correct even to speak of the "legal position" with regard to this matter, since adoption, in the sense of the creation of a relationship analogous to that of parent and child between a child and one not its parent, is unknown to the law as it now stands. During the past few sessions of Parliament, Bills dealing with the subject and seeking to legalise adoption agreements have been regularly presented, and have in some cases made considerable progress, and, during the last five years, two expert Committees have carefully considered the subject from every angle. In August, 1920, the then Home Secretary appointed a committee with Sir Alfred Hopkinson, K. C. as Chairman, and Mr. Neville Chamberlain, M. P., Lady Norman, Mr. Seddon, M. P., and others as members, "to consider whether it is desirable to make legal provision for adoption of children in this country, and if so, what form such provision should take." That committee presented, in February, 1921, an exhaustive Report, and unanimously recommended the passing of legislation to give legal recognition to the adoption of children on lines specified in detail ; the amendment of the Children Act of 1908 to secure notification and supervision of adoptions which did not receive formal legal

sanction ; and the legitimation of children born out of wedlock by the subsequent marriage of their parents. The last of these matters is being dealt with separately by a Bill introduced by the Lord Chancellor into the House of Lords this session.

—*The Law Journal,* May 9, 1925, p. 430.

Lord Birkenhead on Lord Mansfield.—Certainly the eighteenth century was a great time for Judge-made law. The legislature had not yet learned to interfere to any considerable extent by statute ; that was reserved for the nineteenth century; and what the present century will do and whether it will see Rules and Orders substituted as the chief source of law are questions for the future. But with Lord Hardwicke, of whom Lord Birkenhead wrote in the *Empire Review* last month, as the founder of equity jurisprudence, and with Lord Mansfield, of whom he writes this month, as "the founder of the commercial law of this country," the reputation of the eighteenth century is safe. The description just quoted, which Lord Birkenhead repeats from the eulogy of Mr. Justice Buller in *Lickbarrow* v. *Mason* (2 T. R. at p. 73) has passed into legal currency. It was Lord Mansfield's achievement that he brought the law into touch with the practical requirements of business life. "Coke," says Lord Birkenhead, "captured the law merchant for the common law ; Holt retained it ; Mansfield formally incorporated it into our system."

—*The Law Journal,* May 9, 1925, p. 431.

The New Judicial Committee Rules.—A new Code of Judicial Committee Rules has been passed by Order in Council dated May 2, 1925. These revoke the Judicial Committee Rules of 1908, and come into operation on January 1 next. This early issue of the Rules has been made in order that there may be time for their wide circulation throughout the Overseas Dominions before they take effect. The alterations are chiefly in the nature of machinery and do not substantially alter the practice, except in one respect, dealt with by Rule 4. This provides that, in future, applications for special leave to appeal must be accompanied by an affidavit of service of notice of the intended application upon the other parties. Hitherto it has been possible to make this application *ex parte* and the alteration is an important one. We never think of this Court without being impressed by the great position it

occupies in the world, rivalled only by the wide jurisdiction and recognised authority of the Supreme Court of the United States.

—*The Law Journal,* June 6, 1925, p. 525.

BOOK REVIEWS.

THE LAW OF COMPULSORY LAND ACQUISITION AND COMPENSATION, by S. G. Velinkar, with a Foreword by Sir Norman Macleod, Chief Justice of the Bombay High Court.

We have great pleasure in announcing the publication of *The Law of Compulsory Land Acquisition and Compensation* by one who is intimately connected with the administration of the law on the subject. His great experience in the working of the law will invest his observations with an authority which deserves serious consideration by those who have to deal with the subject. The work is one of the first-rate importance on the Law of Land Acquisition. The author has dealt with the Land Acquisition Act in Part I of the book. The commentaries are clear and concise and give reference in suitable places to all the decisions bearing upon the questions dealt with. English cases have been cited where the provisions of the English statute and Indian law are similar. Part II of the work contains all the enactments, Imperial and Provincial, dealing with Land Acquisition and Compensation, prominent among which may be mentioned, The City of Bombay Improvements Act, The Calcutta Improvement Acts, and The United Provinces Improvement Act. Commentaries are given under the sections of these Imperial and Provincial Acts wherever necessary with reference to case-law. The index to the work seems to have been prepared with very great care and will therefore be found to be of great assistance.

THE LAW OF TRANSFER (*inter vivos*) IN BRITISH INDIA, by Lal Gopal Mukerji, Judge, High Court of Judicature, Allahabad. Messrs. R. Cambray & Co., Calcutta.

This book which has for its basis the Transfer of Property Act is written not on the ordinary lines of a commentary but of a treatise on the subject illustrating the principles by the sections of the Transfer of Property Act and the discussions in the reported cases. The aim of the author has not been to

give a beadroll of cases but to deal with the subjects in their logical order omitting references to unnecessary case-law as much as possible. It is well known that the Transfer of Property Act while dealing in unnecessary detail with portions of Law of Property which are not of much practical use in this country is defective in not referring to some branches of the law of every-day use here. As instances of the latter we would refer to the law relating to partition, family arrangements and settlements. The treatment of the subject will be found of great use to the legislator desirous of effecting alterations and amendments in the Transfer of Property Act and to the student who has to keep the principles of law clearly before his mind, not to speak of the practical lawyer.

THE INDIAN STAMP ACT WITH COMMENTARIES, by S. Kasturirangachariar, B. A., B. L., Lawyers' Companion Series, 1925.

The various amending enactments of the central and local legislatures of the Indian Stamp Act and the accumulation of case-law on the subject have rendered the appearance of this book at this time as a very welcome publication. To avoid confusion the amendments made by the local legislatures of the various provinces have been indicated separately at the end of each section ; and in respect of the stamp duties detailed in Sch. I of the Act, the amounts of such duties have been sufficiently and clearly indicated in each province separately with the name of the province prefixed such amounts, so that at one glance the lawyer can get at the correct stamp duty without being put to the necessity of referring to the schedule of each local Act separately. The case-law has been brought down to the end of March, 1925, and the various appendices give the stamp rules of the Imperial and Local Governments which are sure to be found of great use.

THE IMPERIAL BANK CASE, published by Messrs. Rochouse & Sons, Madras.

We congratulate Messrs. Rochouse & Sons on this publication. *The Notable Trials Series* of England have been a big success and the proceedings from day to day of many an important and sensational criminal trial are available for reading in book form to the lawyer as well as the layman. The

idea of the publishers of the present volume is evidently to do the same with regard to the sensational "Imperial Bank Case", which was tried in the Madras High Court about a year ago by Mr. Justice Beasley and a special Jury. There is a brief historical introduction giving a summary of the facts relating to the case and then follows a *verbatim* report of the proceedings in the High Court. The printing and get up of the volume are good, and the price is not at all high. The numerous illustrations enhance the value of the publication.

[We invite the attention of the litigant public and the members of the legal profession to the new Judicial Committee Rules especially those relating to applications for special leave. The rules will come into operation in the place of the Judicial Rules, 1908, on the 1st January, 1926.]

THE JUDICIAL COMMITTEE RULES, 1925.

St. R. and O., 1925, No. 440|L.4.

At the Court at Buckingham Palace, the 2nd day of May, 1925.

Present.

The King's Most Excellent Majesty.

Lord President. — Chancellor of the Duchy of Lancaster.
Lord Chamberlain.

Sir George Lloyd.

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council in the words following, viz. :—

"The Lords of the Judicial Committee having taken into consideration the Practice and Procedure in accordance with which the general Appellate Jurisdiction of Your Majesty in Council is now exercised and being of opinion that the Rules regulating the said Practice and Procedure ought to be amended Their Lordships do hereby agree humbly to recommend to Your Majesty that with a view to such amendment certain Orders in Council regulating the said Practice and Procedure, viz., the Orders in Council dated respectively the 21st day of December, 1908, (*a*) the 23rd day of May, 1916, (*b*) the 25th day of March, 1920, (*c*) the 9th day of March, 1921, (*d*) and the 15th day of March, 1922, (*e*) amending the said Practice and Procedure

(*a*) S. R. & O., 1908, No. 1288.
(*b*) S. R. & O., 1919, No. 1810.
(*c*) S. R. & O., 1922, No. 789.
(*d*) S. R. & O., 1922, No. 278 (not printed in S. R. & O. form).
(*e*) S. R. & O., 1922, No. 279.

ought to be revoked as from the 1st day of January, 1926, and that the several Rules hereunto annexed ought to be substituted therefor and ought to come into operation on that date."

His Majesty having taken the said representation into consideration was pleased, by and with the advice of His Privy Council, to approve thereof and to order, as it is hereby ordered, that the said Orders in Council in the said representation mentioned be and the same are hereby revoked as from the 1st day of January, 1926, and that the Rules hereunto annexed be substituted therefor to come into operation on that date.

Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

Arrangement of Rules.

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1. [*Interpretation.*] (1) In these Rules, unless the context otherwise requires :—

"Appeal" means an Appeal to His Majesty in Council ;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer ;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;

"Registrar" means the Registrar or other proper officer having the custody of the records in the Court appealed from ;

"Abroad" means the country or place where the Court appealed from is situate ;

"Agent" means a person qualified by virtue of Her late Majesty's Order in Council of the 6th March, 1896, to conduct proceedings before His Majesty in Council on behalf of another ;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "Petitioner," "Appellant," "Respondent") mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent ;

"Respondent" includes Intervener ;

"Month" means calendar month ;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an Appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

Leave to appeal.

2. [*Leave to appeal generally.*] All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

Special leave to appeal.

3. [*Form of Petition for special leave to appeal.*] A Petition for special leave to appeal to His Majesty in Council shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted, and shall be signed by the Counsel who attends at the hearing or by the party himself if he appears in person. The Petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

4. [*Five copies of Petition to be lodged together with Affidavits in support.*] The Petitioner shall lodge at least five copies of his Petition for special leave to appeal together with the Affidavit in support thereof prescribed by Rule 50 hereinafter contained, and, unless a Caveat as prescribed by Rule 48 has been lodged by the other parties who appeared in the Court below, an Affidavit of service of notice of the intended application upon such parties or their Solicitors or Agents, either abroad or in England.

5. [*Time for lodging Petition.*] A Petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay.

6. [*Security for costs and transmission of Record.*] Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar to the Registrar of the Privy Council and for such further matters as the justice of the case may require. Unless otherwise ordered the security shall be lodged at any time before the Appellant enters an Appearance.

7. [*General provisions.*] Save as by the four last preceding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal.

8. [*Petitions for special leave to appeal* in forma pauperis.] Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Peti-

tions for leave to appeal *in forma pauperis*, but in addition to the Affidavits referred to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth 25*l*. in the world excepting his wearing apparel and his interest in the subject-matter of the intended Appeal, and that he is unable to provide sureties, and also by a certificate of Counsel that the Petitioner has reasonable ground of appeal.

9. [*Exemption of pauper Appellant from lodging security and paying Office fees.*] Where a Petitioner obtains leave to appeal *in forma pauperis*, he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees.

10. [*Exemption of unsuccessful Petitioner for leave to appeal* in forma pauperis *from payment of Office fees.*] A Petitioner whose Petition for leave to appeal *in forma pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a Petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

Record and Appearance by Appellant.

11. [*Record to be transmitted without delay.*] As soon as the Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council, and the Registrar shall, with all convenient speed, certify to the Registrar of the Privy Council that the Respondent has received notice, or is otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or is otherwise aware, of the dispatch of the Record to England. Where an Appellant who has obtained special leave to appeal by an Order of His Majesty in Council fails to have the Record transmitted to the Registrar of the Privy Council with due diligence, the Registrar of the Privy Council shall call upon the Appellant to explain his default, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the special leave to appeal granted should not be rescinded. The Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons recommend to His Majesty to rescind the grant of special leave to appeal or give such other directions therein as the justice of the case may require.

12. [*Printing of Record.*] The Record shall be printed in accordance with the Rules contained in Schedule A hereto. It may be printed either abroad or in England. When printed abroad the parties in England shall, upon perusal, consider whether the order of the documents is in accordance with these Rules, and if it is not, they shall agree upon the proper order. The Appellant shall then rearrange copies of the Record for the use of the Judicial Committee and the other parties. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

13. [*Number of copies to be transmitted, where Record printed abroad.*] Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof, and by affixing thereto the seal, if any, of the Court appealed from.

14. [*One certified copy to be transmitted, where Record to be printed in England.*] Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

15. [*Record printed partly abroad, partly in England.*] Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

16. [*Reasons for judgments to be included.*] The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall be included in the Record.

17. [*Exclusion of unnecessary documents from Record.*] The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a typewritten list to be transmitted with the Record.

18. [*Documents objected to to be indicated.*] Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

19. [*Registration and numbering of Records.*] As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with the Rules contained in Schedule A hereto shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

20. [*Inspection of Record by parties.*] The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

21. [*Appearance by Appellant.*] The Appellant shall enter an Appearance before taking any step in the prosecution of the Appeal, and after entering such Appearance shall forthwith give notice thereof to the Respondent, if the latter has entered an Appearance.

22. [*Times within which a copy of a written Record shall be bespoken.*] Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a typewritten copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—2*d*. per folio of English matter, 2 1|2*d*. per folio of Indian matter, and 3 1|2*d*. per folio of foreign matter; and shall also engage to pay at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at least 50 copies thereof.

23. [*Preparation of copy of Record for printer.*] As soon as the Appellant has obtained the typewritten copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the printer, in accordance with the Rules contained in Schedule A hereto, and shall, if the Res-

pondent has entered an Appearance, submit the copy, as prepared for the printer, to the Respondent for his approval. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

24. [*Lodging copy of Record for printing.*] As soon as the typewritten copy of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the Privy Council for printing by a printer selected by the Registrar of the Privy Council, and at the same time shall lodge the amount of the estimated cost of printing the Record.

25. [*Special Case.*] Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special Case, and print such parts only of the Record as may be necessary for the discussion of the same, provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the Proceedings.

26. [*Examination of proof of Record and striking off copies.*] The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

27. [*Number of copies of Record for parties.*] Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

28. [*How costs of printing Record are to be borne.*] Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

Petition of Appeal.

29. [*Times within which Petition shall be lodged.*] The Appellant shall lodge his Petition of Appeal—

(*a*) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts ;

(*b*) Where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof :

Provided that nothing in this Rule contained shall preclude the Appellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be desirable for him to do so.

30. [*Form of Petition.*] The Petition of Appeal shall be lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

31. [*Service of Petition.*] The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Withdrawal of Appeal.

32. [*Withdrawal of Appeal before Petition of Appeal has been lodged.*] Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

33. [*Withdrawal of Appeal after Petition of Appeal has been lodged.*] Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance ; or, having entered an Appearance, consents in writing to the prayer of the Petition,

the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Non-prosecution of Appeal.

34. [*Dismissal of Appeal where Appellant takes no step in prosecution thereof.*] Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any Respondent who has entered an Appearance in the Appeal.

35. [*Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.*] Where an Appellant who has entered an Appearance—

(*a*) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 22; or

(*b*) having bespoken such copy within the periods prescribed by Rule 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record ; or

(*c*) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29;

the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

36. [*Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.*] Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar

shall issue a summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

37. [*Restoring an Appeal dismissed for non-prosecution.*] An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Appearance by Respondent.

38. [*Time within which Respondent may appear.*] The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

39. [*Notice of Appearance by Respondent.*] The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

40. [*Form of Appearance where all the Respondents do not appear.*] Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

41. [*Separate Appearances.*] Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

42. [*Non-appearing Respondent not entitled to receive notices or lodge Case.*] A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a Case in the Appeal.

43. [*Procedure on non-appearance of Respondent.*] Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply :—

(*a*) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court, appealed from admitting the Appeal, or of the Order of His Majesty in Council, giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the dispatch of the Record to England, the appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal ;

(*b*) If the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the record as a Respondent, the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent :

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clause (*a*) and (*b*) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

44. [*Respondent defending Appeal* in forma pauperis.] A Respondent who desires to defend an Appeal *in forma pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal.

Petitions generally.

45. [*Mode of addressing petitions.*] All Petitions for orders or directions as to matters of practice or procedure arising after the

lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

46. [*Orders on Petitions which need not be drawn up.*] Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

47. [*Form of Petition and number of copies to be lodged.*] All Petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the full title and Privy Council number of Appeal to which the Petition relates or the full title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed, except as provided by Rule 3. Unless the Petition is a Consent Petition within the meaning of Rule 56 at least five copies thereof shall be lodged.

48. [*Caveat.*] Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

49. [*Service of Petition.*] Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the Party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

50. [*Verifying Petition by Affidavit.*] A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or

any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions and the information enabling him to present the Petition.

51. [*Petition for Order of Revivor or Substitution.*] A Petition for an Order of Revivor or Substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the Record in place of, or, in addition to, a party who has died or undergone a change of status.

52. [*Petition disclosing no reasonable cause of appeal or containing scandalous matter to be refused.*] The Registrar of the Privy Council may refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous, or contains scandalous matter, but the Petitioner may appeal, by way of motion, from such refusal to the Judicial Committee.

53. [*Setting down Petition.*] As soon as a Petition and all necessary documents are lodged the Petition shall thereupon be deemed to be set down.

54. [*Times within which set-down Petitions shall be heard.*] On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the Opponent consents to the Petition being put in the paper on an earlier day.

55. [*Notice to parties of day fixed for hearing Petition.*] Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a petition, notify all parties concerned by Summons of the day so appointed.

56. [*Procedure where Petition is consented to or is formal.*] Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report

to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last-preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

57. [*Withdrawal of Petition.*] A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last-preceding Rule.

58. [*Procedure where hearing of Petition unduly delayed.*] Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may, after notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon.

59. [*Only one Counsel heard on a side in Petitions.*] At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

Case.

60. [*Lodging of Case.*] No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal Provided that where a Respondent who has entered an Appearance does not desire to lodge a Case in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

61. [*Printing of Case.*] The Case may be printed either abroad or in England, and shall, in either event, be printed in accordance with the Rules I to III contained in Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal or by the party himself if he conducts his Appeal in person.

62. [*Number of prints to be lodged.*] Each party shall lodge 30 prints of his Case.

63. [*Form of Case.*] The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The Taxing Officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

64. [*Separte Cases by two or more Respondents.*] Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same Appeal.

65. [*Notice of lodgment of Case.*] Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

66. [*Case Notice.*] Subject as hereinafter provided, the party who lodges his Case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last-preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case, with a "Case Notice," requiring him to lodge his Case within one month from the date of the service of the said Case Notice and informing him that, in default of his so doing, the Appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default Provided that no Case Notice shall be served until after the completion of the printing, or rearrangement under Rule 12, of the Record, and also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

67. [*Setting down Appeal and exchanging Cases.*] Subject to the provisions of Rule 43 and of the last-preceding Rule, an Appeal shall be set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, etc.

68. [*Mode of binding Records, etc., for use of Judicial Committee.*] As soon as an appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order : (1) Appellant's Case ; (2) Respondent's Case ; (3) Record (if in more than one part, showing the separate parts by incuts, all parts being paged at the top of the page) ; (4) Supplemental Record (if any) ; and the short title and Privy Council number of the Appeal shall also be shown on the back.

69. [*Time within which bound copies shall be lodged.*] The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

70. [*Notice of day on or before which Appeals must be set down for ensuing Sittings.*] The Registrar of the Privy Council shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for the ensuing Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any directions from the Committee to the contrary, be heard in the order in which they are set down.

71. [*Notice to parties of day fixed for hearing Appeal.*] The Registrar of the Privy Council shall, subject to the provisions of R. 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

72. [*Only two Counsel heard on a side in Appeals.*] At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

73. [*Nautical Assessors.*] In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

Judgment.

74. [*Notice to parties of day fixed for delivery of Judgment.*] Where the Judicial Committee, after hearing an Appeal, decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the Judgment.

Costs.

75. [*Taxation of costs.*] All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C hereto.

76. [*What costs taxed in England.*] The taxation of costs in England shall be limited to costs incurred in England.

77. [*Order to tax.*] The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such Order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements) and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice.

78. [*Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.*] The Taxing Officer may, if he thinks fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last-preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

79. [*Appeal from decision of Taxing Officer.*] Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

80. [*Amount of taxed costs to be inserted in His Majesty's Order in Council.*] The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

81. [*Taxation on the pauper scale.*] Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals. Such pauper scale shall apply to and include the application upon which leave to appeal *in forma pauperis* was granted.

82. [*Security to be dealt with as His Majesty's Order in Council determining Appeal directs.*] Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

83. [*Power of Judicial Committee to excuse from compliance with Rules.*] The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

84. [*Amendment of documents.*] Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

85. [*Affidavits may be sworn before the Registrar of the Privy Council.*] Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

86. [*Change of Agent.*] Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council and the outgoing Agent notice in writing of the change, and shall amend the Appearance accordingly. Until such

notices are given the former Agent shall be considered the Agent of the party until the final conclusion of the Appeal, Petition, or other matter.

87. [*Scope of application of Rules.*] Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

88. [*Mode of citation and date of operation.*] These Rules may be cited as the Judicial Committee Rules, 1925, and they shall come into operation on the 1st day of January, 1926.

SCHEDULE A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8 1|2 inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

IV. Records shall be arranged in two parts in the same volume, where practicable, viz. :—

Part I. The pleadings and proceedings, the transcript of the evidence of the witnesses, the Judgments, Decrees, &c., of the Courts below, down to the Order admitting the Appeal.

Part II. The exhibits and documents.

V. The Index to Part I. shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II. shall follow the order of exhibit mark, and shall be placed immediately after the Index to Part I.

VI. Part I. shall be arranged strictly in chronological order, *i. e.,* in the same order as the index.

Part II. shall be arranged in the most convenient way for the use of the Judicial Committee, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order,

mixing Plaintiff's and Defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

(*a*) a series of correspondence, or

(*b*) proceedings in a suit other than the one under appeal,

shall be kept together. The order in the Record of the documents in Part II. will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Judicial Committee, and in difficult cases Counsel may be asked to settle it.

VII. The documents in Part I. shall be numbered consecutively.

The documents in Part II. shall not be numbered, apart from the exhibit mark.

VIII. Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index, without the date.

IX. Each document shall have a marginal note which shall be repeated on each page over which the document extends, *viz.* :—

Part I.

(*a*) Where the case has been before more than one Court, the short name of the Court shall first appear. Where the case has been before only one Court, the name of the Court need not appear.

(*b*) The marginal note of the document shall then appear consisting of the number and the description of the document in the Index, with the date, except in the case of oral evidence.

(*c*) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" shall appear beneath the name of the Court, and then the marginal note consisting of the number in the Index and the witness's name, with "examination," "cross-examination," or "re-examination," as the case may be.

Part II.

The word "Exhibits" shall first appear.

The marginal note of the exhibit shall then appear consisting of the exhibit mark and the description of the document in the Index, with the date.

X. The parties shall agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the Index and in the Record), if desired, with the words "not printed" against it.

A long series of documents, such as accounts, rent rolls, inventories, &c., shall not be printed in full, unless Counsel so advise, but the parties shall agree to short extracts being printed as specimens.

XI. In cases where maps sent from abroad are of an inconvenient size or unsuitable in character, the Appellant shall, in agreement with the Respondent, prepare in England, from the materials sent from abroad, maps drawn properly to scale and of reasonable size, showing, as far as possible, the claims of the respective parties, in different colours.

SCHEDULE B.

Countries and places referred to in Rules 22, 29, and 34.

Australia, British Honduras, British North Borneo, Brunei, Ceylon, China, Eastern African Dependencies, Falkland Islands, Federated Malay States, Fiji, Hong Kong, India, Mauritius, New Zealand, Persia, Seychelles, Somaliland Protectorate, Straits Settlements.

SCHEDULE C.

I

FEES ALLOWED TO AGENTS CONDUCTING APPEALS OR OTHER MATTERS BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(33 1|3 *per cent. is added to these fees.*)

		£	s.	d.
Retainer fee	...	0	13	4
Drawing Appearance or Caveat	...	0	5	0
Perusing printed Record, for every printed sheet of 8 pages	...	1	1	0
Perusing written Record, for every 25 folios	...	0	6	8
Drawing Index	per folio...	0	2	0
Drawing Marginal Notes and Headings	per folio ...	0	0	6
Attending at the Registry to examine proof print of Record with the certified Record	per day...	3	3	0
	per half day ...	1	11	6
Correcting revised print of Record, per sheet of 8 pages :—				
Foreign or Indian cases	...	1	1	0
Other cases	...	0	10	6
Instruction for Petition or Motion, or to Oppose	...	0	10	0
Instructions for Petition of Appeal	...	0	10	0
Instructions for Case	...	1	0	0
Drawing Petition, Motion, Case or Affidavit	per folio ...	0	2	0
Copying Petition, Motion, Case or Affidavit	per folio ...	0	0	6

	£	s.	d.
Correcting proof of Case, per sheet of 8 pages :—			
Foreign or Indian cases ...	1	1	0
Other cases ...	0	10	6
Drawing and fair copy Case Notice ...	0	10	0
Perusing Petition, Motion, or Affidavit per folio ...	0	2	0
Perusing Petition of Appeal ...	1	1	0
Perusing Case, per printed sheet of 8 pages ...	1	1	0
Instructions for and preparing Retainer to Counsel ...	0	10	0
Instructions to Counsel to argue an Appeal ...	1	0	0
Instructions to Counsel to argue a Petition or Motion...	0	10	0
Instructions to printer ...	0	10	0
Attending Consultation ...	1	0	0
Attending at the Council Chamber for the hearing of a Petition of Motion ...	1	6	8
Attending at the Council Chamber all day on an Appeal not called on ...	2	6	8
Attending the hearing of an Appeal per day ...	3	6	8
Attending a Judgment ...	1	6	8
Approving draft Order ...	0	10	0
Attendances generally ...	0	10	0
Attendances on Counsel where fee is 30 guineas or over ...	1	0	0
Drawing Bill of Costs per folio ...	0	1	0
Copying Bill of Costs per folio ...	0	0	6
Attending Taxation of Costs of an Appeal ...	2	2	0
Attending Taxation of Costs of a Petition or Motion ...	1	1	0
Sessions Fee for each year or part of a year from the date of Appearance (in Appeals only) ...	3	3	0
Letters, &c. (in Petitions) ...	1	1	0
Letters, &c. (in Appeals) for 1st year ...	2	2	0
For each following year ...	1	1	0

II

Council Office Fees.

Entering Appearance ...	1	0	0
Amending Appearance ...	0	10	0
Examining proof print of Record with the certified record at the Registry (chargeable to Appellant only)			
per day ...	2	0	0
per half day ...	1	0	0
Lodging Petition of Appeal ...	3	0	0
Lodging Petition for special leave to appeal ...	2	0	0
Lodging any other Petition or Motion ...	1	0	0
Lodging Case or Notice under Rule 60 ...	2	0	0
Setting down Appeal (chargeable to Appellant only) ...	5	0	0
Setting down Petition for special leave to appeal (chargeable to Petitioner only) ...	2	0	0

	£	s.	d.
Setting down any other Petition (chargeable to Petitioner only)	1	0	0
Summons ...	1	0	0
Committee Report on Petition ...	2	0	0
Committee Report on Appeal ...	3	0	0
Original Order of His Majesty in Council determining an Appeal ...	5	0	0
Any other original Order of His Majesty in Council ...	3	0	0
Plain copy of an Order of His Majesty in Council ...	0	5	0
Original Order of the Judicial Committee	2	0	0
Plain copy of Committee Order ...	0	5	0
Lodging Affidavit ...	0	10	0
Certificate delivered to parties ...	0	10	0
Lodging Caveat ...	1	0	0
Subpoena to witnesses ...	0	10	0

Taxing Fee 6d. for each pound allowed, or a fraction thereof, up to £300, and one per cent. beyond that sum, calculated at the rate of 5s. for each £25, or a portion thereof.

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SEVERANCE OF JOINT STATUS.

SOME RECENT CASES.

Hari Baksh v. *Babu Lal*, (1924) 47 M. L. J. 938 ; *Palani Ammal* v. *Muthuvenkatachela Moniagarar*, (1924) 48 M.L.J. 83 ; *Lala Jai Narain* v. *Lala Prag Narain*, (1924) 48 M. L. J. 236 ; *Krishnaswami Thevan* v. *Pulukaruppa Thevan*, (1924) 48 M. L. J. 354 ; *Bhagwani Kunwar* v. *Mohan Singh*, (1924) 49 M. L. J. 55 and *Jag Prasad Rai* v. *Mussammat Singari*, (1924) 49 M. L. J. 162.

It may be admitted that the doctrine of severance of status by a unilateral declaration of intention was not for the first time introduced by the judgment in *Suraj Narain's case* (1). But it must equally be said that before the date of that pronouncement, the prevalent idea in this country was that severance of joint status arose only by agreement of parties or from a decree of Court. Courts no doubt differed as to the nature of the evidence from which an agreement could be implied (where there was no express agreement) ; and in some quarters, a leaning against the doctrines of joint tenancy and survivorship predisposed the Court easily to infer such an agreement. But the difference in principle between the earlier view and the later view cannot be ignored (see the judgments in *Soundararajan* v. *Arunachalam* (2)]. Recent cases have dealt with the question from the later standpoint and it may be useful to review some of them to ascertain their exact scope and effect.

In this connection it will be convenient to keep different aspects of the general question sufficiently distinct from each other. The main division of the case-law must be into cases which lay down rules of law and those which lay down rules

1. (1912) I L R 35 A 80 : 24 M L J 345 (P C).
2. (1915) I L R 39 M 159 (F B).

of evidence. Cases like *Thakur Nageshar Baksh Singh* v. *Mussamat Ganesha* (3), *Bhagwani Kunwar* v. *Mohan Singh* (4) and *Jag Prasad* v. *Singari* (5) fall outside both these categories so far as they are mere decisions on particular facts; for though the appraisement of the evidentiary value of the circumstances relied on in each case in proof of division may be largely coloured by the underlying view as to the governing rules of law or evidence, the decisions themselves are not of much value as precedents. The evidentiary aspect of the law relates to the presumption of jointness—the exact scope and limitations of the presumption, and the point at which it ceases to apply. The substantive side is concerned with the legal effect of certain familiar transactions.

As early as 1879, it was laid down by the Calcutta High Court in *Radhacharan Das* v. *Kripa Sindhu Das* (6) that "when once it is admitted that a disruption of the unity of the family has taken place, it is difficult to see how any presumption can arise as to any other particular member or members having continued joint or become separate." This observation was made with reference to an admission that one of three members of a joint Hindu family had separated many years before suit, the question in the suit being whether the other two continued joint or had also become divided. It may be noted in passing that, in this very case, the learned Judges recognised that, "a mere declaration by one member that he was separate from the others would seem to be sufficient to effect the separation." But they drew a distinction between separation and partition and held that a partition is presumably complete because "to effect a partition, it is necessary to ascertain the share to which each and every member of the family is entitled." It is, however, not clear whether by the word 'partition,' the learned Judges referred to a mere specification of shares or to a division by metes and bounds.

It may be instructive to compare these propositions of the Calcutta High Court with the observations of the Privy Council made nearly 25 years later in *Balabux* v. *Rukmabai* (7). All that appeared in the evidence in that case was that one of three brothers had separated himself from the other two, taking his share amounting to about Rs. 11,000. As between the other two brothers, the evidence either way was, in the words

3. (1919) 38 M L J 521 (P C).
4. (1925) 49 M L J 55 (P C)
5. (1924) 49 M L J 162 at 165 (P C).
6. (1879) I L R 5 C 474.
7. (1903) I L R 30 C 725 (P C).

of their Lordships, "too slight to form a satisfactory basis for decision." It was in these circumstances that the Judicial Committee upheld the view that these two brothers also had become divided *inter se* and their reasoning is stated in the following words :—"There is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases, it may be necessary in order to ascertain the share of the out-going member to fix the shares which the other co-parceners are or would be entitled to, and in this sense, the separation of one is said to be a virtual separation of all." On this reasoning, they proceed to base the proposition that "an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." This would mean that in their Lordships' opinion, the *presumption* of jointness will cease to apply when something in the nature of an ascertainment of shares takes place. These observations, it will be noticed, are almost identical in substance with those in *Radhacharan Dass* v. *Kripa Sindhu Dass* (6).

In *Upendra Narain Myti* v. *Gopee Nath Bera* (8), another bench thought that *Radhacharan Dass's case* was not rightly decided and Justice Prinsep who took part in both the cases explained that on the former occasion, his attention had not been drawn to the judgments in *Rewan Pershad* v. *Mussumat Radha Beebi* (9), *Mussamat Cheetha* v. *Baboo Mihena Lall* (10) and *Deen Dayal* v. *Jugdeep Narain* (11). We must, however, point out that these cases only recognised that notwithstanding the separation of the share of one member, the joint status *may* continue among the rest. But they do not touch the question whether a conclusion to that effect can be based upon the mere presumption of jointness or must rest upon positive evidence.

In *Sudarsana Maistri's case* (12) Justice Bhashyam Aiyangar dealt with the question not as a question of presumption but as a point of law, namely, whether the separation of the share of one member necessarily affects the status of the remaining members, so that any further continuance of a joint status can be rested only on a theory of re-union. He was of opinion that, as by agreement of parties, a partition can be

6. (1879) I L R 5 C 474.
8. (1883) I L R 9 C 817.
9. (1846) 4 M I A 137.
10. (1867) 11 M I A 369.
11. (1877) I L R 3 C 198 (P C)
12. (1901) I L R 25 M 149.

partial, there was nothing to compel one to take the view that on a separation of one member, the others must be deemed to have become divided. He therefore held that the continuance of the joint status was possible, apart from a hypothetical re-union. It may, however, be observed in passing that that learned Judge refused to accede to the proposition enunciated in *Radhacharan Das* v. *Kripa Sindhu Das* (6) that a mere declaration by one member that he was separate would suffice to effect a separation.

The matter was put clearly by Chandavarkar, J. in *Anandibai* v. *Hari Suba Pai* (13): "If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before."

When the theory of division by mere unilateral declaration came to be developed, it had to be correlated to the authorities above referred to. Such declaration of intention only gave rise to a separation of the declarant from the family and not to a partition in the sense above explained and the fixation of his share as at the date of the declaration was merely a legal consequence and not the act of the parties. It would therefore be possible to maintain consistently with the earlier authorities that on a division of status of a particular member, resulting from such declaration, the consequences predicated of a *partition* need not necessarily follow and that therefore notwithstanding such separation of one member, even the presumption of jointness may continue to apply to the rest. Where, however, matters had proceeded beyond the mere declaration of intention and an actual partition of that member's share had taken place, the reasons urged in *Balabux's case* (7) would exclude the presumption of jointness as regards the rest and the continuance of the joint status amongst them may have to be established without the aid of any such presumption. Adverting to such a state of things, the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagarar* (14) observe that the "remaining co-parceners *without any special agreement amongst themselves*

6. (1879) I L R 5 C 474.
7. (1903) I L R 30 C 725 (P C). 13. (1911) I L R 35 B 293 at 296.
14. (1924) 48 M L J 83 (P C).

may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property." (The italics are ours). The special agreement referred to in the italicised words is evidently one in the nature of a re-union. That the continuance of the joint status is not rested on any presumption even here is clear from the succeeding sentence, where they say that such continuance "may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parcener had separated from them." In the High Court, however, Wallis, C. J. went the length of saying that the observation in *Balabux* v. *Rukmabai* (7) cannot be read as affecting the presumption that the other co-parceners remain united, at any rate, in this part of India, where all that is shown is, that one co-parcener has severed himself and had his share allotted to him. [See *Palaniammal* v. *Muthuvenkatachela* (15)]. The other learned Judge (Kumaraswami Sastri, J.) does not however express any opinion on the question of presumption, beyond referring to two earlier cases which only negatived the contrary presumption. The earlier of these cases in *Ranganadha Rao* v. *Narayanaswami Naicker* (16) merely pointed out that the decision in *Balabux's case* (7) did not lay down that on the separation of one member, the family must in all cases be deemed to be divided. In the other case *Rangasami Naidu* v. *Soundararaja Naidu* (17) the Court recognised that on a partition, there is a presumption of its being complete but that this presumption may be rebutted. It is therefore difficult to regard this as recognising the continuance of the presumption of jointness in spite of the partition of the share of one member. The learned Judges only refused to accept the broad proposition that the separation of one member necessarily effected a separation *inter se* amongst the rest. On this part of the subject, it only remains to refer to *Hari Baksh* v. *Babu Lal* (18) and *Lala Jai Narain* v. *Lala Prag Narain* (19) where, dealing with the question of presumption, the Judicial Committee lay down that on a separation between branches, there is no presumption that the members within each branch become divided *inter se* and that it is not necessary in such cases to prove an agreement amongst such members to conti-

7. (1903) I L R 30 C 725 (P C).
15. (1917) 33 M L J 759 at 762.
16. (1908) I L R 31 M 482.
17. (1916) 31 M L J 472.
18. (1924) 47 M L J 938.
19. (1924) 48 M L J 236.

nue joint. *Balabux* v. *Rukmabai* (7) and the cases that followed it are put in another category.

The determination or specification of shares is often specially relied on in support of a plea of division because it is well established that during the joint state no member has got a right to any specific share. But a division of status is undoubtedly the result of the intention of the parties and no particular act can be held to involve such a division unless it helps the Court to infer that such was the intention of the parties. If, therefore, the specification of shares whether in the revenue accounts or elsewhere can be otherwise explained, a Court is not bound to infer a severance of status therefrom. This is apparently what their Lordships mean by the observation in *Palani Ammal* v *Muthu Venkatachala Moniagarar* (14) that "there may be other reasons than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be." But in the absence of such explanation, the natural inference will be in favour of an intention to divide. It may be as their Lordships say in *Bhagwani Kunwar* v. *Mohan Singh* (4) that such definition of shares cannot be taken as 'conclusive evidence' that a partition was intended, but with all respect it does not seem right to throw on the person alleging separation the onus of proving 'that such definition of shares was with a view to a then partition.'

Where a partition is effected by a decree of Court, it is no doubt true in a general sense to say that the extent of severance must be determined with reference to the terms of the decree. But, having regard to the underlying principle, there is no reason why the Court should impose upon the parties a divided status contrary to their wishes. It is therefore only on the assumption that the decree is in accordance with the intention of the parties that the terms of the decree can be the guide. There is no difficulty in accepting this view so far as the plaintiff in the suit is concerned ; but when there are more defendants than one, the assumption may not always be justified. If the defendants prefer a division between themselves, it is not uncommon for them to apply for the allotment of their respective shares on payment of stamp duty and follow it up by a division by metes and bounds. Where such a course

4. (1924) 49 M L J 55 (P C). 7. (1903) I L R 30 C 725 (P C).
14. (1924) 48 M L J 83 at 86 (P C).

is not adopted and where the pleadings do not clearly disclose a desire on the part of the defendants to become divided *inter se,* the mere fact that the judgment or even the decree specifies the fractions to which each sharer would be entitled need not suggest an inference of division in status among the defendants. The tendency of recent cases is evidently in this direction.

The theory of division by a unilateral declaration of intention has given rise to certain difficulties in fixing the date from which the division takes effect. In view of the principle on which that theory is rested, viz., that partition is a matter of individual right and volition and does not depend on the concurrence or even acquiescence of the other co-parceners, it is difficult to see the logical basis for insisting upon the communication of such intention to the other co-parceners. [*Kamepalli Ayilamma* v. *Mannam Venkatasami* (20)]. Taking it that such a communication is only a matter of practical necessity and not part of the legal essentials, the question will arise, from what moment the division of status is to be deemed to take effect. Suppose there are a number of co-parceners living in different places. Is it to be held that the divided status arises only after every one of them receives the communication ? Suppose the declarant dies after posting the communication but before it reaches any of the other co-parceners : Is the rule of survivorship to apply or not ? Questions like these cannot be satisfactorily answered until the logical basis of the rule as to communication is settled.

The recognition of a *locus penitentiae* in this class of cases gives rise to anomalies and difficulties of another kind. We presume that if a person sends a formal notice of his intention to become divided, the Court is scarcely likely to give him an opportunity of recalling it a year later, simply because in the interval some members of the family happen to die, and the declarant finds it to his interest to claim the benefit of the rule of survivorship. It is difficult to see why a different rule should apply when such declaration takes the form of the institution of a suit for partition.

In the *Wadi-mitta case* (15) the High Court referred to the fact that in the days in which the prior proceedings in question took place, it was not the prevalent idea that the mere

15. (1917) 33 M L J 759.   20. (1917) 33 M L J 746.

institution of a suit for partition worked a severance. But the judgment of the Privy Council is based on general grounds and it will be possible, according to it, for a plaintiff in a suit for partition to withdraw it and claim to continue joint if events happening during the pendency of the suit make it worth his while to prefer the continuance of the joint status. True their Lordships say that notwithstanding the withdrawal the plaint would *unless explained* 'afford evidence that an intention to separate had been entertained,' but it is not clear what the kind of explanation they contemplate is. In the case in *Kedar Nath* v. *Ratan Singh* (21), no reason for the withdrawal appeared, but the decision was based on the fact that after the withdrawal the brothers continued to live together. The remarks made by some of their Lordships in the course of the arguments (as reported in the Law Journal) would rather seem to suggest that they were proceeding on the older view that the mere institution of a suit for partition does not effect a severance. If a division in status had arisen, neither joint living nor acts of joint enjoyment or management would prove the continued existence of a joint family status. [*Jag Prasad Rai* v. *Mussamat Singari* (5)].

The uncertainty arising from the above considerations is emphasised in cases where the plaintiff in a partition suit happens to be a minor. In *Chelimi Chetty* v. *Subbamma* (22) it was decided that the mere institution of a suit for partition by a next friend does not separate the minor from the joint family and this view has recently been reaffirmed in *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (23). But in the last mentioned case, the learned Judges have laid down that if the claim for partition on behalf of the minor is ultimately allowed, the severance in status takes effect *as from the date of the plaint*. We are afraid that the state of suspension during the pendency of the suit is likely to add to the anomalies of this part of the law. It is no doubt ordinarily true that a decree relates back to the date of the institution of the suit and in the view that the institution of a suit for partition is itself sufficient to effect a severance, this principle will be *a fortiori* applicable to partition suits ; but on the hypothesis that a minor has not the capacity to declare his intention to become divided, and

5. (1924) 49 M L J 162 (P C). 21. (1910) 20 M L J 900.
22. (1919) I L R 41 M 442 : 31 M L J 213. 23. (1924) 48 M L J 354.

that the guardian's declaration is no substitute for the minor's, it would seem to follow that a division in this class of cases results not from the intention of the parties but only from the act of the Court. It must be mentioned in this connection that prior to *Suraj Narain's case* (1) the view here was that in partition suits the divided status arose only from the date of the decree and it was not suggested that the decree related back to the date of institution of the suit.

SUMMARY OF ENGLISH CASES.

FOULSHAM (INSPECTOR OF TAXES) *v.* PICKLES, (1925) A C 458 : 94 L J K B 418.

Income-tax—Employment abroad—Possession outside the United Kingdom—Income-tax Act, 1918, *Sch. D, Case V.*

Under the terms of a contract an Englishman was to serve 9 months of the year in Africa and was to be paid an annual salary and commission. The latter was to be drawn only in England, and as a matter of fact in the year of assessment the whole of his salary and commission was paid into an English Bank by the company. *Held*, by the House of Lords [disapproving on this point the view expressed in (1924) 1 K. B. 323] the employment abroad was "possession outside the United Kingdom" within the meaning of Case V, Sch. D to the Income-tax Act, 1918 ; but as the whole source of his income was not abroad and the moneys were actually paid into a Bank in England, Case V would not apply.

GLOUCESTER RAILWAY CARRIAGE AND WAGON CO. *v.* INLAND REVENUE COMMISSIONERS, (1925) A C 469 : 94 L J K B 397.

Income—Letting out wagons—Depreciation written down in books—Sale—Excess over book value—If income or capital increment—Corporation Profits Tax.

A company was dealing in wagons, either by selling them or letting them on hire. In the case of the latter, they used to value the wagons annually, after writing off a certain proportion for depreciation. Some of these wagons which were usually let on hire were sold, and they fetched prices far in excess of the latest value as entered in the books. *Held*, the difference in the two prices was income and not capital increment and as such Corporation Profits Tax was payable thereon.

1. (1912) I L R 35 A 80 : 24 M L J 345 (P C).

SOUTH BEHAR RAILWAY *v.* INLAND REVENUE COMMISSIONERS, (1925) A C 476 : 94 L J K B 386.

Corporation Profits Tax—Company—Railway company receiving annual payments—Carrying on trade or business.

A company was formed in England to construct and run a railway in India ; after construction, the company handed over the line to the Secretary of State for India, who agreed to pay annually £30,000 to the company, which was distributed among the shareholders, after deducting office expenses, income-tax. *Held*, by the House of Lords, affirming (1924) 1 K B 390, that the company must be deemed to be carrying on trade or business and was liable to Corporation tax.

TRUSTEE OF THE PROPERTY OF ELLIS & CO. *v.* DIXON-JOHNSON, (1925) A. C. 489.

Bankruptcy—Deposit of shares with brokers—Unauthorised sale and subsequent insolvency—Rights of parties—Set off—Date for ascertaining value of shares—Bankruptcy Act, 1914, *S.* 31.

A person who carried on speculative business through a firm of brokers placed with them as security for any sums that might become payable by him on taking accounts certain shares. The brokers without the knowledge of their customer and contrary to his directions sold the shares, made use of the sale proceeds and thereafter became bankrupt. The trustee in bankruptcy claimed to recover from the customer moneys due on taking accounts, after giving credit for the value of the shares realised. *Held*, the well-understood rule in equity was that if a creditor holding security sued for his debt, he was under an obligation on payment of the debt to hand over the security ; and if, having improperly made away with the security, he is unable to return it to the debtor, he cannot have judgment for the debt. As the security consisted of shares, the Court could direct the ascertainment of their price as on the date of judgment. (1924) 2 Ch. 451 affirmed.

SWEDISH CENTRAL RAILWAY CO., LTD. *v.* THOMPSON, (1925) A. C. 495.

Income-tax—Company—Duality of residence—Registration, if sole test—Business abroad, office in England—Liability to taxation—Income-tax Act, 1918, *Sch. D, Case V.*

A Company was formed in England for constructing and working a railway line in Sweden. The registered head office was in London. After the line was built, it was leased to a traffic company for a term of years, the lessees undertaking to pay an annual sum as rent. Subsequently, the Articles of the Company were altered for the purpose of removing the management and control to Sweden and thereafter all the business was being managed and controlled in Sweden. But a small Committee of Directors was appointed in London for transacting some routine formal matters, such as transfer of shares, affixing the seal to the share certificates, signing cheques on the London banking accounts, etc. No meetings of the Directors took place in London, and no profits transmitted to the United Kingdom, except the dividends to the English shareholders. The question arose whether for purposes of income-tax, the Company ought to be regarded as residing in the United Kingdom within the meaning of Sch. D, Case V of the Income-tax Act, 1918. *Held,* by a majority of the House of Lords (*Lord Atkinson dissenting*) for the purposes of the Income-tax Acts a registered company could have more than one residence and as such the company was rateable in the United Kingdom. Case-law discussed. (1924) 2 K. B. 255 affirmed.

Per Viscount Cave, L. C. :—*Quaere* :—If registration of a company in the United Kingdom is itself sufficient proof of residence ?

GOH CHOON SENG *v.* LEE KIM SOO, (1925) A. C. 550.

Master and servant—Unauthorised trespass—Scope of employment—Liability of master—Privy Council—Concurrent findings of fact—Interference.

Where there are concurrent findings of fact by the Court of First Instance and the Court of Appeal, it is only in rare cases and upon special grounds that their Lordships of the Judicial Committee advise a reversal of the decision of the Courts below.

Where a servant is doing some work which he is appointed to do, but he does it in a way which his master has not authorised and would not have authorised, had he known of it,—such as by committing an unauthorised act of trespass—and thereby causes damage to another, the master is nevertheless liable.

In re BATES : SELMES *v.* BATES, (1925) 1 Ch. 157 : 94 L. J. Ch. 190.

Will—Construction—Annuity—Free of income-tax—If includes super-tax.

By his will, a husband gave his wife "such a sum in every year as after deduction of the income-tax for the time being payable in respect thereof will leave a clear sum of £2,000." *Held,* the annuity was to be paid free of income-tax only and she was not entitled to payment of any sum in respect of super-tax.

In re WHITE : KNIGHT *v.* BRIGGS, (1925) 1 Ch. 179.

Will—Codicil—Disposition—Reference to "a former will"—Identification—Evidence—Admissibility.

When there is a reference in a codicil to a prior testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence and when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it, that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified. But the reference must be to an existing document and evidence is not admissible if the reference may be to a future document.

SEDDON *v.* COMMERCIAL SALT COMPANY, LTD., (1925) 1 Ch. 187.

Practice—Affidavit of documents—Discovery—Forfeiture

It is a well-established rule that in an action claiming forfeiture, a Court will not grant discovery of documents to help the person claiming forfeiture.

In re GIBBS AND HOULDER BROTHERS AND CO., LTD.'s LEASE: HOULDER BROTHERS AND CO., LTD. *v.* GIBBS, (1925) 1 Ch. 198.

Lease—Covenant—Provision against assignment without consent—Consent not to be withheld "unreasonably"—Tests of determining—Fear that adjoining premises might fall vacant—If reasonable.

One of the terms of a lease for years was that the lessee was not to assign without the consent of the lessor and there was a recital that the lessor was not to withhold permission

unreasonably in the case of a respectable assignee. On a proposal being made by the lessee to assign to *X*, the lessor refused to consent on the ground that if the assignment took place *X* would quit another adjoining premises which he had taken on lease from the same lessor, and the latter would have difficulty in getting such a good tenant. *Held*, the refusal was unreasonable, as the only ground on which a refusal could be based was the want of respectability in the assignee. Case-law discussed.

BATCHELOR *v.* MURPHY, (1925) 1 Ch. 220 : 94 L. J. Ch. 177.

Lease—Option to purchase—Transfer of residuary period—Memorandum—Execution of new lease "on the same terms and conditions in all respects"—If includes option to purchase.

The lessee of certain premises who had an option to purchase the freehold at a fixed price wanted to transfer the unexpired portion of the lease to another. To carry out this object the lessor prepared a memorandum addressed to himself which was signed by the lessee and the transferee. It recited that in consideration of the lessor releasing the lessee and accepting the transferee as the lessee for the unexpired period, the original lease was to be surrendered and the transferee was "to execute a lease for the unexpired term on the same terms and conditions in all respects as the old lease." The transferee entered into possession and paid rent regularly, but no lease deed was executed. He then claimed to exercise the option of purchasing the freehold. *Held*, by the majority of the Court of Appeal (Pollock, M. R. dissenting) that the "new lease" in the memorandum referred to the execution of a lease deed and as such the intention was to incorporate therein all the terms of the old lease including the option to purchase and hence the transferee could claim to exercise the option.

Per Pollock, M. R. [agreeing with Tomlin, J. in (1924) 2 Ch. 252] :—The option to purchase cannot be said to be a term of the lease, and as it is only a collateral bargain, the transferee cannot have the benefit of it in the absence of words in the memorandum sufficient to introduce that option.

SACK *v.* JONES, (1925) 1 Ch. 235.

Easement—Party wall—Mutual right of support—Disrepair of one house—Subsidence—Liability of owner.

Two adjacent houses were separated by a party wall, and each of them had mutual rights of support and mutual party wall rights. One of them alleged that the house of the other was subsiding owing to want of repair, and by reason thereof the party wall had been deflected and owing to want of lateral support his house was being affected. He brought a suit for declaration, injunction, damages, etc. *Held*, even if the plaint allegations were proved, the action would fail as the defendant was not under a duty to repair his house. A servient owner is under no liability to repair, provided he does no act detrimental to the rights of the other party.

In re, KUYPERS : KUYPERS *v.* KUYPERS, (1925) 1 Ch. 244.

Will—Bequest—Shares—Subsequent alteration in character of shares—Effect of.

A testator who possessed 15 per cent. cumulative preferred ordinary shares of £1 each in a company by means of her will made a bequest of the income of 600 such shares to a certain person for life, with a direction that thereafter they should fall into the residue. Prior to the death of the testator the company re-organised its capital and each of the old shares became an 8 per cent. cumulative preference share. It was at the same time resolved that part of the undivided profits of the company should be capitalized and applied in payment to each old shareholder an equal number of the new 8 per cent. shares. After the death of the testator, the question arose what the legatee was entitled to. *Held*, he was entitled only to the income of the six hundred 8 per cent. cumulative preference shares, and not in the additional six hundred issued by way of compensation to the testator.

BERNIERS *v.* FLEMING, (1925) 1 Ch. 264.

Specific performance—Construction of contract to sell—Vendor claiming performance according to erroneous construction—Effect of—Repudiation of contract—Acceptance—Delay.

A vendor who in claiming specific performance of a contract to sell puts a wrong interpretation upon the contract does not thereby forfeit his claim to specific performance of the contract as rightly interpreted by the Court, if he is willing so to modify it.

Where in a suit for specific performance by the vendor, the parties are at variance as to the interpretation to be put on the contract and the purchaser pleads willingness to complete the transaction according to a correct interpretation of the same, he cannot at the trial go back upon his plea and claim rescission of the contract on the ground that the plaintiff's insistence on a wrong construction of the agreement amounted to a repudiation of the contract which it was open to him to accept.

Per Sargent, L. J. :—It is essential that a party to a contract who desires to avail himself of an act of repudiation by the other party should evidence his election to do so with every reasonable despatch.

In re HARDYMAN : TEESDALE *v.* MCCLINTOCK, (1925) 1 Ch. 287.

Will—Construction—Legacy to "wife"—If enures in favour of subsequently married second wife—Codicil—Doctrine of re-publication.

A testatrix by her will bequeathed a legacy " in trust for *X*, his children and his wife........ " and at the time of the will, *X* had a wife living. Some years after, the wife died and the testatrix who was well aware of the fact, made a codicil to the will, which did not in any manner affect the above legacy. Subsequent to the date of the codicil, *X* re-married and died without children. The question arose whether the second wife was entitled to the legacy. *Held,* if the testatrix had died without leaving the codicil, the second wife would not take anything, as she was not the wife living at the date of the will. But the effect of the codicil was to republish the will and the Court for the purposes of ascertaining the intention of the testator would regard the republication of the will by the codicil as an expression of the testator's intention as at that date. As she knew on that date that the first wife was dead, but still made no alteration of the provisions of legacy the second wife must be taken to have been contemplated therein.

In re, BLACKWELL : BLACKWELL *v.* BLACKWELL, (1925) 1 Ch. 312.

Will—Construction—Contingent interest—Devise to eldest son " who shall be living at the time of my death absolutely

upon his attaining the age of 21"—Nature of interest—Accumulations.

A testator devised his real estate in favour of the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years" and failing such son, other directions followed. At the time of his death, the testator had a son who was a few months old. *Held,* on a construction of the will, the interest which the son took was an interest contingent on his attaining the age of 21, and the same was the case in respect of the accumulations of the rents and profits of such real estate.

In re, JONES : JOHNSON *v.* ATTORNEY-GENERAL, (1925) 1 Ch. 340.

Will—Construction—Personal estate—Failure of residuary bequest—Absence of next of kin—Executor—If takes beneficial interest—Escheat.

A testator appointed his wife and another person X as executors and after payment of debts, funeral expenses, etc., bequeathed all his property, real and personal, to his wife. She, however, predeceased him and subsequently the testator died leaving no heir-at-law or next of kin. On the question arising whether the surviving executor X would be entitled to the personal estate, *held* as the will itself indicated the intention on the part of the testator that X was not to take beneficially X was only a trustee and on failure of the *cestui que trust,* the beneficial interest vested in the Crown as *bona vacantia.* The character of trustee is affixed to the executor by the will and is not altered by the accident that there is no *cestui que trust* to take beneficially.

NEUSCHILD *v.* BRITISH EQUITORIAL OIL COMPANY, LTD, (1925) 1 Ch. 346 : 94 L J Ch. 201.

Company—Extraordinary and special resolutions—Meeting for confirming extraordinary resolution called for within a month—Adjournment of meeting—Confirmation more than a month after—Validity—Companies Consolidation Act, 1908, *S.* 69 (2).

At an extraordinary general meeting of a company, an extraordinary resolution was passed for voluntary liquidation and the appointment of liquidators. To confirm this as a special resolution under S. 69 (2) of the Companies Consolidation Act

[*corresponding to S.* 81 (2) *of the Indian Companies Act*] another meeting was fixed for a date within 30 days of the prior meeting. But as by that time certain legal transactions had not been completed, the meeting was adjourned to a later date when the extraordinary resolution was confirmed as a special resolution. But by that time more than one month had elapsed from the first meeting and the question arose whether the special resolution was valid within the meaning of S. 69 (2). *Held*, the adjourned meeting was only a continuation of the previous one and hence the resolution was valid.

BEYFUS *v.* LODGE, (1925) 1 Ch. 350.

Specific performance—Contract of sale—Non-disclosure of material facts—Purchaser's claim for rescission and return of deposit.

Where a vendor of lands, though acting in good faith, withholds from the purchaser certain material facts directly affecting the value of the property which were within his own knowledge and which the intending purchaser could not have ascertained and which it was the vendor's duty to disclose, he cannot be granted specific performance against the purchaser.

Where, however, there was no misrepresentation, though there was an omission to disclose a material fact, but such omission rendered no stated fact untrue, and the contract being for the sale of leaseholds subject to the liability under covenants to repair as to which the contract expressly stated that there might be landlord's notices outstanding at the time of sale, a vendee is not entitled to claim rescission of the contract and return of the deposit money merely because the landlord's notice to repair was not disclosed to him.

In re, GREY : TODD *v.* TAYLOR, (1925) 1 Ch. 362.

Will—Charitable gift—Promotion of sport among soldiers—Validity of.

A testator by his will gave certain sums of money "to form the nucleus of a regimental fund for the promotion of sport, including in that term only shooting, fishing, cricket, football and polo." On a question arising whether the legacies were given on trusts which were charitable, *held* it was obviously for the benefit of the public that persons entrusted with the defence of the realm should be physically efficient and hence the legacy was a good charitable gift.

In re, BATHE : BATHE *v.* PUBLIC TRUSTEE, (1925) 1 Ch. 377.

Will—Construction—Absolute gift—Restraint of marriage with specified persons—Validity of.

A testator made certain bequests in favour of his son. By subsequent codicils he provided that in the event of the son marrying certain specified persons, he should forfeit all benefits under the will. The son married a lady, who was not one of the specified persons, and after becoming entitled to the bequests, took out summons for getting it decided if the provisions as to forfeiture were valid. It transpired in evidence that though the specified ladies had been perfectly described in the codicils, they had been identified that both were alive and one of them married. *Held*, the condition was not void for uncertainty as the ladies had been identified. Although it is a condition in defeasance of an estate already vested and is in restraint of marriage, the restraint being only partial was not illegal ; nor was the condition impossible of fulfilment, though the probability of its coming into force was remote. The son therefore took what was devised to him, subject to defeasance on breach of the condition at any time.

TAYLOR *v.* BRITISH LEGAL LIFE ASSURANCE CO. LTD., (1925) 1 Ch. 395.

Landlord and tenant—Lease of upper and lower floors—Right of passage of water and gas pipes—Exercise of right—Excessive user.

Where the lessee of the upper floor of a house has a right to carry gas and water pipes through the floor below, the exercise of the right must be in such a way as to not to cause unnecessary inconvenience, annoyance, disturbance or injury to the owner of the servient tenement.

RICKETTS *v.* COLQUHOUS, (1925) 1 K. B. 725.

Income-tax—Emoluments of office—Money spent as travelling and hotel expenses—Deduction—If "wholly, exclusively and necessarily incurred" in discharge of office duties—Income-tax Act, 1918, *Sch. E, R.* 9.

A barrister residing and practising in London was appointed Recorder of Portsmouth. To hold his Quarter Sessions, he had to travel to the place four times in the year and incur hotel expenses during his stay there. He claimed to deduct

from the emoluments of his office the said expenses for purposes of income-tax. *Held*, by the majority of the Court of Appeal (Warrington, L. J. dissenting) the expenses could not be said to be "wholly, exclusively and necessarily" incurred in the discharge of his duties as Recorder and would not form an item of deduction. (1924) 2 K. B. 347 affirmed.

JOTTINGS AND CUTTINGS.

Lord Mansfield and Fearne.—Apart from the work which Lord Mansfield did for the commercial law, there are a multitude of interesting points in his judicial career. Of course, "silver-tongued Murray" had a political and oratorical career as well, but that is matter of general history. It is for lawyers to remember with amusement how he first discovered that every deed must be an indenture, because the edge was not mathematically straight. It is for lawyers, too, to remember his controversy with Mr. Fearne, which Lord Macnaghten recalled in *Van Grutten* v. *Forwell* (1897, A. C. 676), and to which Lord Birkenhead refers, "*Perrin* v. *Blake* (1 W. Bl. 672)," Says the latter, "turned on a point about contingent remainders Mansfield's judgment was reversed in the Exchequer Chamber, and earned for him one of the worst misfortunes that can befall a lawyer. It was adversely criticised in Fearne's *Contingent Remainders*, a work of the highest authority, though never of general circulation." We agree. "Fearne" was not a best seller, but dustv copies still repose on conveyancers' shelves. In fact, legal controversy seems to have been a little acute in those days. "Lord Mansfield and Fearne," said Lord Macnaghten, "differed and quarrelled. Lord Thurlow and Mr. Hargave agreed in everything, and they quarrelled too. They had been friends." In these days our great conveyancers do not quarrel with the Judges. They draw interminable Law of Property Acts and the Judges look on with complacency, knowing full well that their time is coming. It is of Mansfield the story is told that he advised a new Colonial Judge, quite ignorant of law, never to give any reasons for his decisions. The Judge, as long as he followed this advice, did excellently, but growing bold, neglected it and fell. "No list," says Lord Birkenhead in conclusion, "of the six greatest Judges whom the British Empire has produced could exclude the brilliant name of

Mansfield." Yes, but who are the six ? Lord Birkenhead's articles have got to No. 9, so he is not confining himself to this select circle.

—*The Law Journal,* May 9, 1925, p. 431.

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Life Assurance and Married Women.—It is the act of a wise husband to effect a life assurance policy, so that if he dies before attaining a certain age, his wife will not be left destitute, while if they both survive that date, they will have something to live upon in their old age. The Married Women's Property Act, 1882, S. 11, provides that a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife or children, shall create a trust for their benefit, and shall not form part of his estate or be subject to his debts. The effect of this is that, if the husband dies before the named date and his estate is insolvent, creditors, including traders, cannot claim the policy money as being part of his estate, but it is a trust in favour of the wife and children, and they are entitled to it. If he survive the named date, the policy money is impressed with a trust for their joint benefit, and does not form part of the husband's estate. Apparently there has been some doubt expressed in the text-books whether these endowed policies are covered by S. 11, but Mr. Justice Astbury, in *Re Ioakimidis Policy Trusts* (*Times,* 9th inst.,) has held that an endowment policy is to be regarded for this purpose as an ordinary life policy, with the benefit of acceleration in certain events—a decision which will allay any fears which may have existed upon the question. The only case in which creditors will benefit arises if it can be proved that the policy was effected, and the premiums paid, with intent to defraud them, in which case they will be entitled to receive out of the policy money a sum equal to the premiums paid. The benefits conferred by the section are mutual as between husband and wife, and a policy effected by the wife and expressed to be for the benefit of husband or children takes effect as a trust in their favour in the same way, so as not to be subject to her debts.

—*The Law Journal,* May 16, 1925, p. 456.

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A Faulty Verdict of a Jury.—In Weber v. Birkett the Lord Chief Justice, delivered on March 5 last, has, as "Cursitor" recently said, been upheld, on appeal, by Bankes,

Scrutton and Atkin, L. JJ. (*Times*, 22nd ult.). It will be remembered that an action in defamation combined two claims, one in respect of a speech (slander) and the other in respect of a report of it (libel) ; and that, with the defence, one hundred guineas were paid into Court in respect of each claim, that is to say, £210 in all. The jury found for the plaintiff and fixed the damages at £200; but, notwithstanding the most pressing invitation from the Lord Chief Justice, the jury would not allocate the damages to the respective claims. Each side, therefore, claimed judgment, relying upon such hypothetical allocations of the £200 awarded, with reference to the £210 paid into Court, as were severally convenient to themselves. The Lord Chief Justice felt himself bound to hold that the result of the jury's finding must be the same as if they had disagreed and made no finding at all, and that the same consequences must follow. With that conclusion the Court of Appeal has readily and entirely agreed ; and it would thus appear that, however regrettable is such defeasance of a jury's manifest intention, the learned Judge is in no degree to be blamed in this instance. A further but more technical interest attaches to the judgment of the Court of Appeal, in that Atkin, L. J., upon *Benning* v. *The Ilford Gas Company* [(1907) 2 K. B. 291] being cited as a useful authority, threw considerable doubt upon its correctness.

—*The Law Journal*, May 16, 1925, p. 456.

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The Plea of Jus Tertii *in Ejectment.*—Can the defendant in an action of ejectment set up the plea of *jus tertii* ; that is, can he say to the plaintiff, " it may be that I have no title to the land, but certainly you have not, because the real owner is X."? According to what is known as the rule in *Doe* v. *Barnard*, [(1849) 13 Q. B. 945] he can do so. In that case the plaintiff had, as between herself and the defendant, who had managed to secure possession, the better title, but in the course of her own evidence it appeared that she was not in fact entitled, and she failed. " She has," said Patterson, J., in delivering the judgment of the Court (Lord Denman, C. J., Patteson, Coleridge and Erle, JJ.) " by her own showing proved the title to be in another, of which the defendant is entitled to take advantage. " Or can the plaintiff rely on the principle that possession is a good title against all except the true owner ? This is the rule, based upon the ancient law

of disseisin, which was enunciated by Cockburn, C. J., in *Asher* v. *Whitelock,* [(1865) L. R. 1 Q. B. 1], and which appears to have been approved by Lord Macnaghten in delivering the judgment of the Judicial Committee in *Perry* v. *Clissold*, (1907 A. C. 73). On the strength of these two later cases it has been not infrequently assumed that *Doe* v. *Barnard* is overruled, but it seems that this conclusion is to be accepted with caution. A very interesting discussion of the question will be found in an article, "The Plea of the *Jus Tertii* in Ejectment," by Mr. S. J. Wiren in the current *Law Quarterly Review*. The numerous cases on the subject are stated and compared in great detail, and at the end of the article there is a list of the books in which it is referred to, with the views taken in them. The writer of the article inclines in favour of the admissibility of the plea of *Jus Tertii,* and whether he is right or no, his article is characterised by careful arrangement and reasoning, and it is a storehouse of information.

—*The Law Journal,* May 23, 1925, p. 479.

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Lord Darling as a Poet.—To say that all lawyers are poets at heart would be, of course, considerably to overstate the case. But the age-old association between the Law and the Muse is no mere matter of chance. And it is singularly fitting that from out that modern Sabine retreat, the Temple, should come the latest effort to capture the old Horatian inspiration. Lord Darling, in resorting so persistently to the Pierian spring, is not only observing the right tradition, but, what is far more important, setting the right example ; and about his latest verses—" The Pensioner's Garden," contributed to a Sunday newspaper—there is more than a trace of the Horatian manner and form. True, there is, perhaps, a too rhetorical nicety of phrasing—" By mulct and durance dire," for example, can hardly be called a spontaneous line. Again, in " God's ageing children find that Eden Adam lost " there is no echo of the famous " dying fall." But the verses are not without a right glamour ; and the handling of the difficult unrhymed form—shades of Thomas Campion !—is masterly. Lord Darling's serious muse has, perhaps, found its best expression in his lines on Mr. Justice Talfourd's tragic death in Court on the Oxford Circuit.

—*The Law Journal,* May 23, 1925, p. 481.

The New Judge.—Last week we expressed our regret that it should be necessary to appoint a successor to Lush, J., and this week we may express our satisfaction that, as it had to be, the appointment should be one so widely approved. The career at the Bar of Mr. R. A. Wright, K. C., has been recognised in well-informed circles as particularly distinguished, and is now generally appreciated. Without reiterating its details, we venture to call attention to one outstanding aspect of it *pour encourager les autres*. For long years the final achievement of the late Vaughan Williams, L. J., was held up as the example of how courage, patience and determination may survive an inordinate period of waiting for recognition of merit. The case of Mr. Justice Wright may henceforth be quoted to men, young or even of many years' standing, as a good reason for their refusing to be presently disappointed or depressed. Rowlatt, J., whose valued pupil Wright, J. once was, has recalled to the writer with what increasing wonder he remarked the passage of time, and the failure of the profession to remark and avail itself of R. A. Wright's abilities. The older Judge remembers the first appearance in Court of his pupil and of his own almost dismal consolation that, at any rate, that pupil should have been once heard of before his time was up ! Almost immediately afterwards the unknown man became the giant of his particular *milieu*, so that, for all the excessive period of his lean years, he was ultimately able to take silk and achieve the Bench at no abnormally late date in his life and career.

—*The Law Journal*, May 30, 1925, p. 501

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Husband Stealing Wife's Property.—Possibly no branch of the law is in so fluid a state as that relating to husband and wife. It receives constant overhauling at the hands both of the Legislature and of the Judges. The tendency is to regard the rights of the husband and the wife more and more as separate and distinct, and, no doubt, this attitude on the part of the law merely conforms to changing social conditions and popular conceptions. At the same time, the tendency may some time be pushed too far. A few days ago a Metropolitan magistrate entertained a charge of larceny brought by a woman against her husband in circumstances which would seem hardly to have warranted criminal proceedings. It is true that,

in the result, the man was discharged on the facts, but the woman seems to have stated herself out of Court at the beginning. Her husband, she said, stole a ten-shilling note from a coffee-stall at which she earned an independent income. Asked whether she and her husband were living together, she replied that they occupied separate bedrooms, but that they ate at the same table. The learned Magistrate proceeded to hear the case, apparently satisfied that the spouses were not "living together."

—*The Law Journal,* May 30, 1925, p. 503.

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Lord Birkenhead on Lord Eldon.—With the June number of the *Empire Review,* Lord Birkenhead, in his English Judges series, arrives at Lord Eldon. We seem to be getting on to familiar ground. Equity started as "moral virtue," moderating the harshness of the law, and it was a universal truth; at least so said Lord Talbot, C., in *Dudley* v. *Dudley,* (1705, Proc. Ch., 241). But an equity—or *jus naturale*—of this kind was also, as Lord Birkenhead reminds us, "a roguish thing," since in Selden's words, it varied "with the length of the Chancellor's foot." Equity, to be fit for practical use, had to be cast into principles and rules, and so, through Nottingham and Hardwicke, we come at last to Jessel with his rules of equity, not immemorial as the rules of the common law are supposed to be, but invented by one Chancellor after another. "In many cases we know the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented." (*Re Hallett,* 13 Ch. D. 696). And now no Chancellor can invent any more rules. The final stage has come and only the Legislature is able to correct the mistakes and rigour of common law and equity alike.

—*The Law Journal,* June 6, 1925, p. 526.

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Lord Eldon's work in Equity.—In this evolution Lord Eldon occupies a central and conspicuous place. Through his long Chancellorship he completed the work that Hardwicke and his predecessors had begun and left equity a system of rules such as Jessel spoke of. "In the course of his long judicial carreer," says Lord Birkenhead, "he reviewed practically the whole range of equity, and by the time he left office it had become a system of law." It would be wrong, of course, to

say that there has been no change since. Changes there must be under a system of judge-made law, though the changes may not be acknowledged as changes, but only described as the application of an old rule to new facts. To illustrate what Eldon really did, Lord Birkenhead adopts the same plan as in previous articles and gives a series of his decisions, but he has chosen leading cases retained in the last edition of *White* v. *Tudor*, and we need not mention them here. Let it suffice that *Howe* v. *Dartmouth* (7 Ves. 137) is still a frequent citation in the Chancery Division, and *Ex parte Waring* (19 Ves. 345), in which, according to Lord Birkenhead, Lord Eldon cut a Gordian knot and produced a workable solution of a legal impasse, still governs a difficult point of not infrequent occurrence in bankruptcy, and which has several pages in William's Bankruptcy, 13th ed., 227-9, and many columns in the English and Empire Digest assigned to its discussion.

—*The Law Journal,* June 6, 1925, p. 526.

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Lord Eldon's Human Side.—And there are human touches about Lord Eldon which bring him nearer to us than his predecessors. There are the boyish escapades of which Lord Campbell tells, and when young Jack Scott was questioned after robbing an orchard, he was not exactly a George Washington, and he got it hot both from his father and from the excellent schoolmaster whom he afterwards made his chaplain. There is the runaway match with Bessie Surtees, followed by a long and devoted married life, and " the poetry of his life, " it was said, " began and ended with Bessie. " There is his argument in *Ackroyd* v. *Smithson* which made his fortune, and produced such an impression that when later he wanted to argue *contra* in the Lancaster Chancery Court, he was refused a hearing. There were the long delays in giving judgment which he sought to excuse by the motto *sat cito si sat bene*. But he took the satire in the line, " And the Chancellor said—'I doubt', " with his usual good humour, and turned it off by a judgment ending, " and here, the Chancellor does not doubt. " On the other side was the verdict of Sir Samuel Romilly, who said, after the appointment of Sir John Leach as Vice-Chancellor, " I begin to think that the tardy justice of the Chancellor is better than the swift injustice of his deputy";

or, as Lord Birkenhead quotes : "Eldon was '*oyer sans terminer*' and Leach was '*terminer sans oyer*'." "A very cheerful, good-natured old man, loving to take and telling anecdotes with considerable humour and point," is Greville's description, but how would his intense dislike of change have borne these latter times ? But stay ; on occasion, as Lord Chancellor, he discarded his wig. That is a change which for Bench and Bar is still in the future.

—*The Law Journal*, June 6, 1925, p. 526.

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The Earl of Oxford and Asquith.—The King has approved that the Earl of Oxford and Asquith be appointed a Knight of the Most Noble Order of the Garter.

Lord Oxford is the second ex-Premier to receive the highest order of Knighthood in recent years, the K. G. having been conferred on Lord Balfour in 1922.

—*The Law Journal*, June 6, 1925, p. 542.

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Grotius.—Hugo Grotius has been called the founder of International Law, not that he was the first writer in that field, but that he came at a time when the savagery of war threatened to destroy civilisation, and in his great work *De Juris Belli ac Pacis* he systematised the results at which others had arrived, and gave a new impetus to the study of the subject. He was appalled at the horrors of war as then practised, and his object was, not to abolish it—for he carefully distinguished between just and unjust causes of war—but to moderate it and introduce *temperamenta belli*. "I saw," he says, "prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed. Recourse was had to arms for slight reasons or no reason ; and when arms were once taken up all reverence for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint." His book brought him immediate fame, but it had not immediately the effect he sought. Indeed, it was followed by the worst excesses of the Thirty Years' War. But though its effect was deferred, the book was the forerunner of the amelioration of the rules and practice of warfare which were gaining ground through the next three centuries, and

which were formulated in the various Hague Regulations of the end of the last century and beginning of this.

—*The Law Journal*, June 13, 1925, p. 545.

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The Tercentenary of "De Juris Belli."—The *De Juris Belli* was published in 1625, at a time when the author, Holland's greatest son, was an exile in Paris. This week the Society which early in the late war was founded under his name has been celebrating the Tercentenary of the publication. In the sixth of the interesting volumes which each year record the Society's proceedings there is given as a frontispiece a reproduction of a portrait of Grotius said to have been presented by himself to Doctors' Commons, and now in the possession of Lord Phillimore. It forms an interesting link between the past and the present of International Law, and the banquet given in Gray's Inn Hall brought together a very representative gathering of those who are interested in a subject on which the peace and advancement of mankind depend. No more fitting Chairman could have been found than Lord Blanesburgh, who in his work for prisoners of war and on behalf of necessitous ex-enemy aliens has done such influential and humane service. At a time when the unrest following the war seems to threaten that its lessons will be forgotten, the Tercentenary emphasises that the teaching of Grotius is no less important now than in the past. In the words of Lord Blanesburgh, it is the haven through which salvation may come to a distracted world.

—*The Law Journal*, June, 1925, p. 546.

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Admissions and Confessions in Criminal Cases.—Notwithstanding the last-moment protests of the Recorder of Worcester, at his recent Quarter Sessions, and of the ex-Solicitor-General, Sir Henry Slesser, before the Standing Committee, the conclusion arrived at (by 21 votes to 9 of that Committee) is that the new Criminal Justice Bill should comprise a provision abolishing Grand Juries at Quarter Sessions. We have already expressed our views in these notes; we need only record the event. In the same Committee's work a much more serious matter has arisen, and a proposal of much more potent effect had to be considered. The ex-Attorney-General, Sir Patrick Hastings, moved a further proviso that "no admis-

sion, confession, or other statement made by the accused to any police-officer shall be used in evidence against him without the consent of the accused," which consent, we need have no hesitation whatever in adding, would be invariably withheld unless the accused intended to plead guilty. Those who have experience in Criminal Courts, and are able to realise how large a proportion of undoubtedly guilty persons would escape conviction but for their having made an unfortunate observation which enabled strict proof of their guilt, must regard Sir Patrick's proposal aghast. And confusion is worse confounded when it is seen with what convincing arguments it can be supported, at any rate, in theory. For the present, the suggestion is withdrawn, upon the understanding that the police are thoroughly and always impressed with the strict limitations imposed on any process of obtaining admissions and confessions. In case it should ever arise again, we may make one useful observation, and that is to call attention to the expedient adopted in our Possessions. Where a native police exists, with European inspectors and Civil Service officers, the provision of the law is usually that no confession, admission, etc., made to any police-officer *below the rank of inspector* shall be admissible in evidence without the consent, etc. Another solution of the problem is to exclude from evidence any confession, admission, etc., *made after arrest* : a provision which, while giving the utmost consideration to the accused, still leaves some means available to the Court of learning the truth from the one person best qualified to tell it, though he has decided not to tell to the Court.

—*The Law Journal*, June 20, 1925.

BOOK REVIEWS.

RECENT DEVELOPMENTS IN INTERNATIONAL LAW, by Professor J. W. Garner, PH. D., L. L. D., Professor of Political Science in the University of Illinois. TAGORE LAW LECTURE FOR 1922, published by the University of Calcutta, 1925.

Under the auspices of the Tagore Foundation, we have heretofore had many instructive discourses on the history of different branches of law, but we believe this is the first time that a topic outside the sphere of Municipal Law has been chosen and we certainly see no reason to regret the departure.

Already the author of a work on *International Law and the World War*, Professor Garner has more than justified the choice of the Calcutta University Authorities. Far from being technical, the book is in the main a study of contemporary history. As the lecturer points out in his preface, the law of war has of late largely monopolised the field and that part of the subject has therefore necessarily received an almost undue prominence in the lectures. The main heads of discussion are grouped by him as follows :—(1) The enlargement of the international community whose members may be regarded, wholly or in part, as the subjects of international law. (2) The formation and re-statement of the rules of international law and their embodiment textually in the form of conventions. (3) The reconciliation of differences between States as to what the law in respect to particular matter is, or should be, and the removal of divergences of interpretation. (4) The adaptation and extension of old rules of law to new and changed conditions of international life. (5) The formulation of new rules for the regulation of the conduct of relations formerly unregulated or for the regulation of newly established relationships. (6) The development of agencies and processes for the peaceable settlement of international disputes, to the end that law and justice may be substituted in the place of force and violence in the relations between States. (7) The creation of a legal organization for the society of States with rommon legislative, administrative and judicial organs.

The lecturer passes in review the conduct of the several belligerents in the Boer War, the Russo-Japanese War, the Turko-Italian War, the Balkan War and the Great War of 1914-1919. The earlier portion of the work is devoted to the history of the attempts to promote the means of preventing wars by encouraging and facilitating arbitration and to settle and codify the rules of different topics of the law by International Conventions. The concluding chapters narrate the history and achievements of the Peace Conference of 1919, discuss the possibilities and the limitations of the League of Nations and other organisations for the settlement of international disputes without resort to war and indicate certain directions and tendencies in the reconstruction of International Law. Many portions of the book must lead the reader to despair of the possibility of anything like a 'reign of law' in

the sphere of international relations, but the author is optimistic enough to believe that notwithstanding all lapses from and breaches of well-established rules, when passions are running high, the restraining force of law and public opinion is making itself felt and will continue to do so in increasing measure. He pleads strongly and earnestly for the introduction into this sphere of the same conceptions of rights and obligations that now obtain in municipal law, for the practical abolition of the idea of neutrality when one State begins an 'aggressive' war against another and for the promotion of an organisation of States which will provide an effective 'sanction' for the rules of International Law.

THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW, VOL. II. Messrs. Butterworth & Co., Ltd., London.

To all genuine reformers of legal education, we would commend this Journal and seeing how much the welfare of the Commonwealth depends upon the proper framing and administering of laws, it cannot be, at least it ought not to be a small body. The mere narration of the subject-matters dealt with is sufficient to give an idea of the range and interest of the journal. The vocation of public teachers of law is the subject of an interesting address by Professor Holdsworth on the functions, the ideals and the methods of a successful public teacher of law. In an article headed "Future Development of Law," Lord Justice Atkins chalks out the right lines on which the English Law might well be made to develop and also indicates the wrong lines on which it shows signs of developing. The teaching of Comparative Law at the University of Paris is the subject of another article, while yet another deals with the problems of the Modern Law School. The notes deal with such varied subjects as the curriculum of the Faculty of Law in the London University, the Manitoba Law School, and the Students' Text-books. The Society was started as it was recognised that there had arisen alongside of the two branches of the legal profession, a third branch —consisting of teachers of law—which needed its own organisation for the discussion of its own problems and for furtherance of its aims and the journal is intended to record its doings and help its objects. Judging from the issue of the journal for 1925, we can safely predict, we think, a long career of usefulness for it.

TRIAL OF KATE WEBSTER, edited by E. O'Donnel. Messrs. Butterworth & Co., Ltd., India.

Yet another addition to the well-known and popular *Notable British Trials* series has been issued and we have great pleasure in acknowledging the receipt of *The Trial of Kate Webster*. The murder, vividly pictured to us in the course of the trial, is one of peculair horridness as the accused, a female servant, after murdering her own mistress, mutilated and dismembered the body and even boiled the flesh and bones before disposing of them. The attempts made to incriminate two innocent persons and the way in which the accused began to lay the foundation for the same soon after the deed will be of great interest to the layman as well as the lawyer. Incidentally one notices the great strides made in surgical science, and how from a small bone of a body it is possible to put together the whole fabric of a human being and prove the *corpus delicti* even though the corpse has been cut to pieces and disposed of.

The volume under review contains the usual introduction dealing with the history of events and contains two chapters of peculiar interest, one on the psychology of the murderess and the other on similar cases of women servants murdering their mistresses. We have great pleasure in recommending the volume to our readers.

THE INDIAN PENAL CODE WITH NOTES, by Mr. D. Swinhoe, 3rd Edition, 1925. Published by Ray & Raychowdhury, Calcutta. Price Rs. 7-8-0.

This book has already passed through two editions and that a third edition has been called for is, we think, sufficient proof of its popularity and usefulness. The present edition has brought the case-law up to December, 1924. We agree with the author in thinking that the Acts and case-law are presented in a form which is handy for reference. The headnotes of the reported cases are set forth succinctly and the plan adopted of the arrangement in the matter will be distinctly found convenient to the practitioner rendering his search of case-law easy.

CIVIL PROCEDURE CODE (ACT V OF 1908), by P. Hari Rao. Published by The Law Printing House. Price Rs. 2-8-0.

We have great pleasure in acknowledging receipt of *The Code of Civil Procedure* (Bare Text) brought up to the end of March, 1925. The book contains two comparative tables, giving corresponding references to the sections of the old Code and also a copious subject index.

THE MADRAS ESTATES LAND ACT, 1908. The Law Printing House, Madras. As. 14.

We have great pleasure in acknowledging the receipt of *The Madras Estates Land Act* (bare Acts) incorporating amendments and repeals to the end of the 28th February, 1925, by the Law Printing House, Madras.

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IS A PATTA A DOCUMENT OF TITLE ?

The decision in *The Official Assignee of Madras* v. *Badri Narayan Doss* (1) calls for more than a passing notice. By way of security for a loan, the insolvent had deposited a patta relating to some of his lands situated in the moffussil. As the deposit itself was made in Madras, it would have sufficed, in accordance with a long line of cases, to create a valid mortgage if the patta could be regarded as a " document of title " within the meaning of S. 59 of the Transfer of Property Act. [See *Madho Das* v. *Ram Kishen* (2), *Srinath Roy* v. *Godadhur Das* (3) and *Imperial Bank of India* v. *U Rai Gyaw Thu* (4)]. It is not clear from the judgment whether or not there were other title deeds relating to these properties. Their Lordships were, however, prepared to hold that a patta is a document of title, mainly on the ground that if they should hold that a valid equitable mortgage could not be created by depositing that piece of paper it would amount in many cases to a denial of the right to create an equitable mortgage.

To realise the exact scope and effect of the decision, it may be useful to refer briefly to the English Law on the point. In England, what are called equitable mortgages fall under three main heads : (1) Mortgages by equitable owners of their equitable rights, *e. g.*, mortgage of the equity of redemption or mortgage by a *cestui que trust* of his beneficiary interest; (2) an agreement to effect a legal mortgage. (Some decisions seem to treat the mortgage by deposit of title deeds as an agreement to effect a legal mortgage) ; and (3) the creation by legal owners of equitable rights in property by way of security. The mortgage by deposit of title deeds is generally

1. (1924) I L R 48 M 454 : 48 M L J 425.
2. (1892) I L R 14 A 238.
3. (1897) I L R [illegible] C 318.
4. (1923) I L R 51 C 86 : 45 M L J 505 (P C).

treated as falling under the last head. In this country the distinction between legal and equitable estates does not obtain. Arrangements falling under Class (2) are only treated as contracts capable of specific performance and possibly after the judgment of the Full Bench in *Vizagapatam Sugar Development Co., Ltd.* v. *Muthurama Reddi* (5), in the case of a usufructuary mortgage it may also be treated as a legal mortgage if there be transfer of possession by way of part-performance of the contract. A mortgage falling under Class (1) and a mortgage by deposit of title deeds are here regarded as legal mortgages.

We venture to think that in relying on the reasoning in certain English cases the learned Judges have, for the moment, lost sight of the distinction above adverted to. The English cases hold that to effect an equitable mortgage by deposit of title deeds, it is not necessary that all the deeds should be deposited, nor that the deeds deposited should show a complete or good title in the depositor, so long as the deeds deposited are material evidence of title and are shown to have been deposited with the intention of creating a valid charge. [See *Ex parte Wetherall* (6) and *Roberts* v. *Crofts* (7)]. This English view is followed in *Bhupendra Nath Basu* v. *Mt. Wajib-un-nissa Begum* (8), where Chapman, J. says : "There is no technical rule that in an equitable mortgage all the title deeds should be deposited. It is merely a matter of intention." In the Madras case the learned Judges make a point of the hardship that may arise if it should be held that many a ryot, whose only document may be his patta, cannot create an equitable mortgage ; but let us look at another side of the question.

Under the English Law, when an equitable mortgage is pitted against a legal mortgage, the equitable mortgage yields place to the legal, unless the holder of the legal mortgage has done or omitted to do something which prevents him in equity from asserting his paramount rights. It is only when the question of priority arises as between two equitable mortgages that the maxim *qui prior est in tempore, potior est in jure* is applied. Notwithstanding this protection afforded to the legal mortgagee, the very Chancery Courts which had encroached upon the Common Law Rule "that the mere possession of

5. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
6. (1805) 11 Ves 398.
7. (1857) 24 Beav 223.
8. (1917) 2 Pat L J 293 at 301.

title deeds gave the holder no interest in the estate itself, except collaterally, by giving him an interest in the title deeds alone, " were loath to extend the exception further. [*See* Eldon, L. C. in *Ex parte Whitbread* (9)].

In India, a mortgagee by deposit of title deeds is not postponed to a legal mortgagee except where he has been guilty of fraud or gross negligence. The attempt to bring equitable mortgages within the postponement made by S. 48 of the Registration Act was negatived [*Webb* v. *Macpherson* (10), *Gokul Das* v. *Eastern Mortgage and Agency Co.* (11) and *Coggan* v. *Pogose* (12)] on the ground that in all these mortgages there is something more than " a mere oral agreement ".

The result of the present decision will be that all mortgagees in the moffussil must insist on the patta being deposited with them. Even if they merely satisfy themselves by their production, they may bring themselves within the observations of Lord Kindersley in *Waldron* v. *Sloper* (13) " that a party coming into equity is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own ". In many cases, owners of lands in the moffussil do not take out pattas in their name, though they are entitled to do so at any time. If, in such a case, the mortgagee *bona fide* believes the mortgagor when he says that he has not taken out a patta, while, in fact he had taken out one and deposited it or intended to deposit it with another, does the doctrine of *Jones* v. *Smith* (14) that a false answer or a reasonable answer given to an enquiry made may dispense with the necessity of further inquiry apply ? Further, as pointed out by Lord Dunedin in *Imperial Bank of India* v. *U Rai Gyaw Thu* (4) " in parts of India remote from the enumerated towns it would be out of question to hold that there was a necessary duty in taking a mortgage to insist on the production of the title deeds. Registration is sufficient protection ". It is difficult to see how the mortgagor's misrepresentation can affect a *bona fide* mortgagee. It is evident that by this rule the door is in some degree opened to fraud and perjury, and it may well be said,

4. (1923) I L R 51 C 86 at 100 : 45 M L J 505 (P C).
9. (1812) 19 Ves 202.
10. (1903) I L R 31 C 57 : 13 M L J 389 (P C).
11. (1905) I L R 33 C 410.
12. (1884) I L R 11 C 158.
13. (1852) 1 Drew 193.
14. (1841) 1 Hare 43 at 55.

in the words of Lord Eldon, that a creditor who will not be at the trouble of registering his mortgage or getting all the title deeds over the property, if he is desirous of having a charge on the debtor's estate, does not deserve much favour or sympathy. S. 59 of the Transfer of Property Act speaks of "documents of title" and does not say "some or material documents of title".

In England, this form of security was recognised only after the part-performance doctrine had been invented by the Equity Courts. We use the word "invented" as they were all really invented for the purpose of securing the better administration of justice. [*Re Hallet* (15)]. Lord Thurlow's reasoning in *Russell* v. *Russell* (16) seems to be that the delivery of title deeds is sufficient part-performance of an agreement to create a mortgage so as to take the case out of the Statute of Frauds [*see* also *Burgess* v. *Moxon* (17) and *Edge* v. *Worthington* (18)] and that the deposit gave the holder an interest over the lands covered by them and not merely in the title deeds. The result of holding that he had an interest in the title deeds was to give the holder of the title deeds a right to retain them with him till his money was paid and thereby restrain the legal owner from parting with his estate. In short, "the possession of the deeds gave him no direct interest in the estate, but only an interest arising out of the power of embarrassing the proprietor in the sale". The doctrine of part-performance was not recognised in this country, and in Madras, even after the Privy Council applied it in two cases in *Mahomed Musa* v. *Aghore Kumar Ganguli* (19) and *Venkayyamma* v. *Appa Rao* (20), the leaning against it was so great that the High Court refused to interpret the two Privy Council cases cited above as overruling the Full Bench decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (21) [see *Ramanathan* v. *Ranganathan* (22)]. It was only in 1923 that a Full Bench of the Madras High Court in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddi* (5) overruled *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (21) as no longer good law, after the two Privy Council cases above men-

5. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
15. (1880) 13 Ch D 696.
16. 1 Bro C C 269.
17. (1856) 2 Jur N S 1059.
18. (1786) 1 Cox 211.
19. (1925) I L R 42 C 801 : 28 M L J 548 (P C).
20. (1916) I L R 39 M 509 : 31 M L J 58 (P C).
21. (1906) I L R 29 M 336 : 16 M L J 395 (F B).
22. (1917) I L R 40 M 1134 : 33 M L J 253.

tioned. Yet, the mortgage by deposit of title deeds, which, as we have shown above, was an offshoot of the part-performance doctrine in England has been recognised here from an early period, though the reason on which it was based in England was not followed. Not content with that, the decision under review tries also to incorporate the extensions of this doctrine in England.

We may point out here that a Bench of this Court (Krishnaswami Aiyar and Ayling, JJ.) struggled against this extension and held that the deposit by a son of a sale deed in favour of his father was not sufficient to create an equitable mortgage over those properties [see *Venkatramayya Pantulu* v. *Narasinga Rao* (23)]. Consistently with the English Law, we fail to see how the decision can be supported. Their Lordships no doubt found on the facts that there was an award granting these very properties to the mortgagor and they said that in the absence of the award on which alone the son's title to the property depended, they could not hold, that "the mere deposit of the sale deed in the father's name is a good deposit of the properties by the 1st defendant (mortgagor) so as to create a valid mortgage in favour of the plaintiff." In joint Hindu families, the properties descend from father to son by inheritance and there would be no separate deed of conveyance in favour of the son. To say in such cases that the document should show title in the depositor (son) would not be correct. Their Lordships' decision must be limited to cases where there are other documents directly showing title in him.

SUMMARY OF ENGLISH CASES

SMITH *v.* MARTIN, (1925) 1 K. B. 745.

Arbitration—Agreement to refer—Construction—Power of arbitrators to decide question of jurisdiction.

Under the terms of a building contract, the owner was to pay the contractor within a fixed time any sum certified by an architect and in default, the contractor was at liberty to put an end to the contract and recover all moneys due to him. It contained an arbitration clause that differences regarding the construction of the agreement should be settled by arbitration,

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23. (1910) 21 M L J 454.

but such reference was not to be opened until the completion of the works. During the progress of the construction, the architect certified a sum for payment, and as the same was not paid in time, the contractor determined the contract and started arbitration proceedings. *Held,* the arbitration was premature, and could be begun only after the completion of the works.

Per Bankes, L. J.—Where a right to go to arbitration depends on the happening of an event, the arbitrator has no jurisdiction to decide if the event has happened.

PARKINSON *v.* COLLEGE OF AMBULANCE, LTD. AND HARRISON, (1925) 2 K. B. 1.

Contract—Illegality—Gift to charity—Agreement to purchase Knighthood—Failure to perform—Suit for recovery of money—If lies—Fraudulent misrepresentation.

The secretary of a charitable institution represented to the plaintiff that if he made a donation to the institution, he would undertake to procure him a Knighthood. Relying on the same, the plaintiff made a handsome donation to the charity, but did not get the promised honour, whereupon he sued the charitable institution and its secretary for return of the money or for damages for deceit or for breach of warranty. *Held,* a contract to guarantee or undertake that an honour will be conferred if a contribution is made is against public policy and therefore an unlawful contract to make; and as the contract had an element of turpitude in it, the parties were *in pari delicto* and no action for damages could be maintained by the defrauded plaintiff. The plaintiff could not recover the money from the Charity or its Secretary either as money had and received or as damages because he would be disclosing or setting up a contract which was unlawful and which he had no right to make; nor could he resile from the contract, abandon it or sue for the money on the ground the contract was executory.

GRAHAM *v.* GREEN, (1925) 2 K. B. 37 : 94 L. J. K. B. 494.

Income-tax—Betting—Transaction with bookmakers from private residence—Liability to tax—Income-tax Act, 1918, *Sch. D.*

A person who was in the habit of earning his livelihood by betting on horses at starting prices, making bets from his

private residence with bookmakers, without being himself a professional bookmaker, is not liable to pay tax on his earnings under Sch. D of the Income-tax Act, 1918. What he earns does not amount to "profits or gains" within the meaning of Case VI, nor can he be said to carry on a "vocation" within the meaning of Case II.

WEIR AND COMPANY *v.* MCVICAR AND COMPANY, (1925) 2 K. B. 127.

Partnership—Suit against—Appearance of defendant under protest—Denial of partnership—Trial of issue as to partnership—Rules of Supreme Court, O. 48 (a), R. 7.

In an action against a firm, a defendant who had been served as a partner entered appearance under protest in accordance with O. 48 (*a*), R. 7, of the Supreme Court Rules (*corresponding to O.* 30, *R.* 8, *Civil Procedure Code*) denying that he was a partner. He then took out a summons to have an issue whether he was a partner tried first and the hearing of the action stayed till it was over. *Held,* he was not entitled to claim it.

Per Atkin, L. J. : *Quaere*: If an unconditional appearance would amount to such an admission of partnership as would preclude him from afterwards pleading in the alternative that he was not a partner ?

VERELIST'S ADMINISTRATRIX *v.* MOTOR UNION INSURANCE CO., LTD., (1925) 2 K. B. 137 : 94 L. J. K. B. 659.

Insurance—Motor accident—Death of insured—Notice to be given "as soon as possible"—Construction of.

A person whose life had been insured in respect of injuries sustained while travelling in a motor car was killed in a motor accident in India in January, 1923. The insurance policy contained a clause that the insured or his legal representative should give notice of the accident or injury "as soon as possible after it has come to his knowledge." The legal representative came to know of the death within a month, but did not know of the existence of the insurance policy till January, 1924, whereupon notice of the claim was given to the Company immediately. *Held,* in deciding whether notice had been given "as soon as possible," a Court should take into consideration all existing circumstances, such as the available

means of the legal representative's knowledge of the policy and of the identity of the insurance company upon whom the claim was to be made. Under the circumstances, the claim cannot be rejected as made too late.

SIMPSON *v.* TATE, (1925) 2 K. B. 214.

Income-tax—Salary—Medical officer—Subscriptions to societies to keep in touch with latest advances in science—If a deduction—Income-tax Act, 1918, *Sch. E, R.* 9.

A medical officer, who was receiving a regular salary, joined certain professional and scientific societies so that by attending their meetings and procuring their publications he might keep abreast of the highest developments and knowledge of the day. He claimed to deduct from his assessable income the subscriptions paid by him to these societies as moneys "expended wholly, exclusively and necessarily in the performance of the duties of his office" under Sch. E, R. 9 of the Income-tax Act, 1918. *Held,* he was not entitled to do so.

THE KING *v.* SWANSEA INCOME-TAX COMMISSIONERS: *Ex parte* ENGLISH CROWN SPELTER CO., LTD., (1925) 2 K. B. 250.

Writ of prohibition—Income-tax—Assessment of—No appeal filed—Subsequent discovery of losses—Writ if lies.

A trading company was assessed by the General Commissioners of Income-tax on the basis of the average profits of the three preceding years. No notice of appeal was given, and long after the expiry of the appeal period, the company found that in respect of the year in question the business resulted in a loss. It was clear that at the time of the assessment or during the period allowed for preferring an appeal, it was impossible to ascertain whether there would in fact be a balance of profits. The assessee then obtained a rule *nisi* directed to the General Commissioners to show cause why *a writ of prohibition* should not be issued prohibiting them from enforcing the assessment. *Held,* (1) a writ of prohibition could only be issued where there is something done in the absence of jurisdiction or in excess of it and as the Commissioners had only acted in accordance with their statutory duty and not in excess of their jurisdiction, a writ could not issue; and (2) the duty of finding whether there was in fact loss or profit was cast on the Commissioners and not on the High Court.

In re CITY EQUITABLE FIRE INSURANCE CO., LTD., (1925) 1 Ch. 407.

Company—Directors and auditors—Duties of—Signing of cheques—Wilful neglect or default—What is.

Per Romer, J. (confirmed in appeal by Pollock, M. R., Warrington and Sargant, L.JJ.)—The directors of a company in the performance of their duties stand in a fiduciary relation to the company. To find out the exact scope of their duties, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officers. In discharging the duties of his office, a director must act honestly; he must also exercise some degree of skill and diligence. He need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. Nor is he bound to give continuous attention to the affairs of the company. In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

A director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose or that it is subsequently used for that purpose, assuming that the cheque comes before him for signature in the regular way, having regard to the usual practice of the company.

It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except in so far as the company's articles of association may justify him in delegating that duty to others.

An auditor of a company has nothing to do with the prudence or otherwise of making loans with or without security. It is nothing to him how the business of the company is being conducted. His business is to ascertain and state the true financial position of the company at the time of the audit. This he has to do by examining the books of the company. He must make inquiries to see that the books themselves show the true position and unless he does this, the audit is an idle farce. His first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the pur-

pose of satisfying himself that they show the true financial position of the company. He is not, however, bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer and does not guarantee that the books do correctly show the true position of the company's affairs ; he does not even guarantee that his balance sheet is accurate according to the books of the company. He must not certify what he does not believe to be true and he must take reasonable care and skill before he believes that what he certifies is true.

An act or an omission to do an act is wilful when the person knows what he is doing and intends to do what he is doing. Even if that act or omission amounts to a breach of duty and, therefore, to negligence, he is not guilty of wilful negligence unless he knows that he is committing, and intends to commit, a breach of his duty or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.

Per Pollock, M. R.—The duty of an auditor is verification and not detection. He is a watchdog but not a bloodhound.

In re BARRATT : NATIONAL PROVINCIAL BANK, LTD. *v.* BARRATT, (1925) 1 Ch. 550.

Will—Construction—Gift of whole property to widow for life and then to children—Personal estate—If to be enjoyed in specie by widow.

A testator by his will bequeathed the whole of his property of every description to his wife for life and after her decease directed the estate to be divided among his children and grandchildren. He died possessed of personal estate consisting of household goods, furniture, etc. *Held*, the language of the will did not evidence an intent to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth*, 7 Ves. 137 (*a*) and therefore the widow must enjoy it in specie and on her death alone could it be converted.

In re DUDMAN : DUDMAN *v.* DUDMAN, (1925) 1 Ch. 553.

Gift—Suicide of donor—Effect on gift.

Where a donor makes a gift at a time when she contemplates committing suicide and soon after commits suicide, the

gift is invalid. *Agnew* v. *Belfast Banking Co.*, (1896) 2 I. R. 204 followed.

In re COLLINS, (1925) 1 Ch. 556

Bankruptcy—Trade or business—Contracts for personal service—Moneys earned prior to and after bankruptcy—If vest in trustee—Mortgage of contracts prior to adjudication—Effect—Bankruptcy Act, 1914, *S.* 38 (*c*).

A person entered into a number of contracts for rendering personal services with the aid of assistants for remuneration to be paid after the services were rendered. He mortgaged these contracts and by arrangement with the mortgagee, the remuneration was to be received by the mortgagor and thereafter paid over to the mortgagee. The mortgagor became insolvent and on the date of adjudication some remuneration had become due in respect of services already rendered, while with respect to some other contracts the trustee in bankruptcy employed the bankrupt and his assistants to complete the contracts. On a question arising whether the mortgagee was entitled to these amounts, *held*, (1) as regards the amounts which had already become due in respect of services rendered prior to bankruptcy, they were due to the bankrupt " in his trade or business" within the meaning of S. 38 (*c*) of the Bankruptcy Act, 1914 [corresponding to S. 28 (3) of the Provincial Insolvency Act (V of 1920)] and being in his disposition with the consent of the mortgagee, the same vested in the trustee in bankruptcy; and (2) as regards the remuneration which was earned after bankruptcy, the mortgage could not be enforced as against the trustee.

MACAURA *v.* NORTHERN ASSURANCE CO., LTD., (1925) A. C. 619 : 94 L. J. P. C. 154.

Insurance—Company—Shareholder—Creditor—If has an insurabl interest in the assets.

Neither a creditor of a company nor a shareholder, even if he happens to hold all the shares in the company, has an insurable interest over the assets of the company.

ARAMAYO FRANCKE MINES, LTD. *v.* ECCOTT, (1925) A. C. 634 : 94 L. J. K. B. 688.

Income-tax—Company incorporated in England—Working mines abroad—Local Board of Directors abroad—Mine-

rals sold by agents in England—Assessment—Residence—Income-tax Act, 1842, *S.* 100, *Sch. D, Case I.*

An English Company carried on mining operations abroad and after a time the whole business was managed by a local board established at the place of mining. The minerals were sent to a firm of agents in England for sale. The local board was assessed to income-tax in the name of its English agents. *Held,* it was invalid, as the agents were only the agents of the Company and not of the Board of Directors. The Company, as it resided in England and carried on business through agents, could be assessed under Sch. D, Case I of the Income-tax Act. (1925) 1 K. B. 86 affirmed.

ALIANZA COMPANY, LTD. *v.* COMMISSIONERS OF INLAND REVENUE, (1925) A. C. 644 : 94 L. J. K. B. 684.

Corporation Profits Tax—Company—Residence in England—Trade wholly abroad—Liability to tax—Finance Act, 1920, *Ss.* 52, 53.

A Company which has its residence in England, but which is carrying on trade exclusively outside the United Kingdom, is nevertheless liable to pay Corporation Profits Tax under S. 52, Finance Act, 1920. The fact that it may not be liable to pay income-tax has no bearing on the question. (1924) 1 K. B. 870 affirmed.

SORRELL *v.* SMITH, (1925) A. C. 700.

Trade combination—Protection of trade interest—Conspiracy—Withdrawal of supplies—Intention to injure.

A union of news-agents in order to ward off certain other news-agents who had set up shops in their area without their permission requested the plaintiff, one of their own members, to withdraw his custom from the persons who supplied papers to the newcomers and transfer it to another. The defendants, a committee of newspaper proprietors, thought the action of the plaintiff's union was wrong and threatened to cause a discontinuance of the supply of papers to the persons to whom plaintiff transferred his custom. In doing so, the defendants were not actuated by spite towards the plaintiff but acted only to protect their trade interests. In an action for restraining the defendants, *held,* affirming the decision of the Court of Appeal in (1924) 1 Ch. 506 the action should fail, as no wrong had been threatened or committed against the plaintiff.

Per Viscount Cave.—A combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him is actionable. But if the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. This distinction is expressed by saying that in the former case there is no just cause or excuse for the action taken, while in the latter there is.

Per Lord Dunedin.—If a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage. The use of the words "legitimate" and "wrongful" criticised.

Every one has a right to conduct his own business upon his own lines and as suits him best, even although the result may be that he interferes with other people's business in so doing. An act that is legal in itself will not be made illegal because the motive of it may be bad. But even though the dominating motive in a certain course of action may be the furtherance of a man's own business or interests, he is not entitled to interfere with another man's method of gaining his living by illegal means which may be either means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. It is wrong to hold in such cases that conspiracy is a mere side issue instead of being the very gist and essence of the decision.

Per Lord Sumner.—The object or purpose of the aggressive action of combination is the principal thing to be considered, but both object and purpose are words standing in need of strict definition.

Per Lord Buckmaster.—A threat to do an act which is lawful cannot create a cause of action, whether the act threatened is to be done by many or by one. A combination to promote trade interest is not illegal without malice and the onus is not on the defendant to justify but on the plaintiff to prove that the act was spiteful or malicious.

Quaere.—Even if a wrong has been committed, whether plaintiff is competent to maintain the action ?

In re SCORER : BURTT *v.* HARRISON, 94 L. J. Ch. 196.

Will—Construction—Gift to "my brother and sisters of all I possess"—Gift to a class—"Securities"—Meaning of.

A testatrix who wrote out her own will gave "to my brother and sisters in equal shares all I possess in money and securities......." At the time of the will she had one brother and four sisters, but by the time of her death the brother and two of the sisters had predeceased her. *Held*, on a construction of the will, it was not a gift to *personae designatae* but a gift to a class and therefore the surviving sisters took the whole.

The word "securities" when used in an instrument means securities for money and not an investment such as stocks or shares other than debenture stock. But the will having been drawn up by a laywoman, it ought to be construed as including all investments.

GARRARD *v.* JAMES, 94 L. J. Ch. 234 : (1925) 1 Ch. 616.

Contract — Guarantee — Company — Performance of covenant guaranteed by Directors personally — Liability — Covenant ultra vires *the Company — Effect.*

The plaintiff wanted his son-in-law to be appointed the Manager of a Company and under an agreement advanced £1,500 to the Company, for which he was allotted 1,500 preference shares. The agreement with the Company was that whenever the son-in-law left the service of the Company, the Company would purchase the shares at par and accept a bill for amount drawn on them. Two of the Directors guaranteed that in default of payment by the Company they would be jointly and severally liable. The son-in-law left the service, whereupon the plaintiff claimed the amount from the Company and as they refused to accept the bill, he sued the Directors under their covenant. *Held*, though a covenant by a Company to purchase its own shares was *ultra vires* and illegal, the Directors were liable on their guarantee.

In re ELLIS : MYTTENACRE, *Ex parte*, 94 L. J. Ch. 239 : (1925) 1 Ch. 564.

Bankruptcy — Deed of arrangement — Non-assenting creditor — If can apply for enforcement of trust — Deeds of Arrangement Act, 1914, *S.* 23.

A creditor who does not assent to a deed of arrangement is not competent to apply for the enforcement of the trust or the determination of questions arising under the deed under

S. 23 of the Deeds of Arrangement Act. Under that section the only persons who can apply are the trustee, the debtor and the creditors who are entitled to the benefit of the deed.

ROLLS-ROYCE, LTD. *v.* SHORT, 94 L. J. K. B. 651.

Income-tax—Deduction—Double taxation—United Kingdom tax assessed on three years' average—Loss in Indian business for the period—Effect—Finance Act, 1920, *S.* 27 (1)

A Company which had its head office in the United Kingdom had a branch in India. For the year ending 5th April, 1921, it was assessed to income-tax in England, based on the average profits wherever made for the three years ending with 31st October, 1919. So also for the year ending 5th April, 1922, on the average profits for the three years ending with 31st October, 1920. For these three year periods, the Indian branch incurred losses, but for the income-tax years ending with 31st March, 1921, and 31st March, 1922, the basis for assessment under the Indian Income-tax Act being the amount of profits in the preceding twelve months, the branch in India was assessed to Income-tax and Super-tax. The Company claimed relief under S. 27 (1) of the Finance Act with respect to the same part of the income assessed. *Held,* they were not entitled to relief, since they were not liable to pay tax in the United Kingdom on the Indian income, as there was a loss on the average of three years.

CORDY *v.* GORDON, 94 L. J. K. B. 670 : (1925) 2 K. B. 276.

Income-tax—Gross salary—Payments for board, lodging, etc., deducted out of salary—Amounts varying according to cost of living—Tax payable on gross salary—Income-tax Act, 1918, *Sch. D, Case II, R.* 2 (1).

Where a person is paid a gross salary and is to pay back to his employers out of that in respect of board and lodging which he is bound to take out of them, not a fixed sum but a sum which varies according to the cost of living, he is bound to pay income-tax on his gross salary. The case is different where a man is paid a salary and in addition receives board and lodging, in which case he is assessable on his salary alone, and the saving secured to him by providing him with board and lodging cannot for purposes of income-tax be estimated and added to his salary.

JOTTINGS AND CUTTINGS.

Passengers alighting from Railway Trains.—The particular circumstances discussed in *Sharpe* v. *The Southern Railway* (*Times*, 24th ult.) have frequently arisen before, and there are a number of reported cases as to the position arising in law when a railway passenger alights from a train, which has come to a standstill at his station, but not so as to bring his particular carriage door opposite the platform. As Bankes, L. J. pointed out, it is essential to the passenger's cause of action that there should be the invitation on the part of the company, express or implied, to alight. In *Bridges* v. *North London Railway Co.* (L. R. 7 H. L. 213) it was doubted whether the calling out of the name of the station is an invitation to passengers, destined to that station, to alight. It was held, however, that the additional fact of a complete stopping and a remaining stationary for a considerable time constituted, with the calling out of the name of the station, evidence to go to the jury. On the other hand, in *Owen* v. *G. W. Railway Co.* (46 L. J. Q. B. 486) the porters' shouting out an "All change here !" did not afford evidence to go to the jury in the case of a passenger who, knowing that her carriage door was not opposite the platform, hastened to alight and omitted to call for assistance. *Robson* v. *N. E. Railway Co.* (2 Q. B. D. 85 : 46 L. J. Q. B. 50) demonstrates that where the passenger, in similar circumstances, is prudent enough to call and wait for assistance, but, assistance not being forthcoming, and the train appearing to be about to proceed, alights and is injured, there is evidence to justify the taking of the jury's verdict.

—*The Law Journal*, July 4, 1925, p. 611.

Advertisement and Argument.—The outside world is not disinclined to laugh at lawyers, so that we lawyers may legitimately criticise the proceedings of the outside world and congratulate ourselves upon any advantage we possess by virtue of our profession and training. Two contemporary matters suggest this reflection. The first is the series of interesting debates being conducted in the columns of the *Morning Post* by amateur advocates, *e. g.*, upon "Spiritualism," "Prohibition" and the "Failure of Feminism". Following the arguments of both sides with close attention, we have come to the conclusion that the gift of argument is not a natural one, and that either case, on any one of the moot points discussed, could have been put very much more forcibly, and would have carried

much more conviction, if it had been drafted, or at least "settled," by an impartial lawyer. To instance a detail: the controversialists all appear to lay too much stress upon and attach too much importance to their personal position and progress in the debate, matters entirely irrelevant to the dispute and not calculated to interest or persuade the large percentage of readers who compose the tribunal. The second contemporary event is the conference of Publicity Experts at Harrogate. Upon the merits or demerits of advertising, regarded in the wide extent which it has to-day attained, we venture no remarks. But, when we regard the expense of it and the inevitability of it now-a-days in any business undertaking, we may surely be thankful for the fundamental rule of our profession which saves us from it! It is a form of competition which, once begun, must always develop an increasing intensity. And the methods of it must necessarily conflict with our professional habit of exact truth and logic. Perhaps the two things go together, and it is because lawyers may not advertise that they remain able to argue effectively?

—*The Law Journal,* July 11, 1925, p. 630.

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The Wig.—When, in the course of last week's heat wave, the temperature in Court rose higher and higher, and the atmosphere became more and more moist, one at least of His Majesty's Judges said that he could stand his wig no longer, and, doffing it, told counsel that they were free to do the same if they wished. The heat wave passed: the atmosphere became normally dry; wigs were resumed, and to all seeming the incident was closed and forgotten. We know, however, of at least one distinguished lawyer who would have something to say in the matter, Sir Alexander Wood Renton, K. C., Treasurer of Gray's Inn; and, since he was once for a short time Editor of *The Law Journal,* we may presume to say it for him. The transient climatic extreme of last week was a modified, a very modified, illustration of the conditions in which the Judicature works in our tropical Possessions, where it is a much debated question: Need the wig be worn? Sir Alexander felt strongly that it should be; the majesty of the Law requires to be adorned to have its full effect. Accordingly, with tact but persistence, he prevailed upon his Judges in Ceylon to sacrifice their comfort in order to maintain their full dignity. One of the latter, Sir Walter Shaw, continued the altruistic practice in Singapore, when he was appointed

Chief Justice of the Straits Settlements ; and even the south-west monsoon, at its zenith, could never induce him to abandon it. Now, a man may be none the wiser or more just in a horse-hair wig than he is uncovered ; but Sir Alexander would, no doubt, contend that it is the institution and not the man which matters. We can advance no argument of logic in favour of the wearing of the wig, either at moments of extreme heat or at all. We can, however, confidently prophesy that our readers, if they apply the visual test for themselves on the next available occasion, will feel a sensible diminution of their respect for Justice upon the disclosure, which the removal of the wig instantly affords, that those who administer it are ordinary human beings like themselves, if somewhat over-decorated ! We are a practical nation, and this wig is not our least practical expedient.

—*The Law Journal,* August 1, 1925, p. 699.

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Libelling the Dead.—The controversy between Lord Gladstone and Mr. Peter Wright will incline most people to think that the honour of the dead, or at least of those so recently dead that smirching or smudging fingers can pain relatives, is not sufficiently protected by our law. The last authoritative case on the subject appears to have been *Rex* v. *Ensor* [(1887) 3 *Times* L. R.] before Mr. Justice Stephen. He then held that no prosecution lay for any defamation of the dead, however atrocious, unless the defamation by implication included the living, who would have their ordinary remedy. In thus laying down the law, he seems to have gone somewhat further than Lord Kenyon did in *Rex* v. *Topham* [(1791) 4 Term Rep. 126], when he acquitted the prisoner for a libel on a dead peer only because the indictment contained no indication that the libel was likely to create ill-blood or induce the surviving relatives to break the peace, etc. It is hard to conceive anything more calculated to make a dutiful son break the peace than a wanton attack on his dead father's honour. In *Broom* v. *Ritchie* [(1905) 6 Fraser 942] Lord Young gave it as his opinion that, in Scottish Law, a civil action lay at the instance of a widow or her children against persons who had slandered her deceased husband, but the case was decided on other grounds and his two colleagues did not agree with him. A civil action, with a cheque at the end as a solatium for outraged feelings, may be deemed less appropriate than a prosecu-

tion as a means of making the punishment fit the crime in such instances. The persons entitled to prosecute should be any near surviving relative who had actually known the deceased, and the defence of truth and publication in the public interest should be available as in ordinary prosecutions for libel of a living person. In his judgment, Mr. Justice Stephen observed that the dead "have no rights and suffer no wrongs"—a *dictum* which, if followed up, should expunge the offence of body-snatching from the statute-book. The reasons why body-snatching is against the law are exactly the same as those which would support a measure forbidding honour-smirching: the pain to surviving relatives and the unrest of the living at the prospect of posthumous and outrageous wrong unredressed by law.

—*The Law Journal,* August 1, 1925, p. 699.

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The Children Report.—The third report on the work of the Children's Branch, which has just been issued, is noteworthy for two features; the section which it contains on the "Scope and Character of the Juvenile Court," and its account of the working of the Probation System; and we should add a third: the style in which it is written and the manner in which it is produced. It is not always in a Blue Book that we find poetical quotations taken from a famous source and adapted to a new but quite ingenious use; but speaking of the large proportion of Borstal inmates who commit their first offences before the age of 16, the author of the Report quotes, in a sense that Wordsworth never intended,

> "Shades of the prison-house begin to close
> Upon the growing Boy."

Perhaps, if we may continue the quotation, it is too late to regain the "vision splendid," which in any case must "fade into the light of common day;" but how these shades may be dispelled or, to come down to plain language, how far the defects of early training can be counteracted by suitable treatment is one of the most valuable functions of the Juvenile Court. Facing another page we find quite a fascinating picture, "A Holiday Group," showing a party of girls on the sea shore, from a Reformatory, of course; but we are advancing in many directions, and it is pointed out that there are advantages in dropping the title "Reformatory for Delinquent Girls," and just calling it Eccles School for Girls, or whatever the place may be.

—*The Law Journal,* August 8, 1925, p. 715.

BOOK REVIEWS.

THE INDIAN COMPANIES ACT, 1913, by S. Kasthurirangachariar, B. A., B. L., High Court Vakil, Lawyer's Companion Series published by the Law Printing House, Madras. Second Edition, 1925.

We have great pleasure in acknowledging the receipt of a copy of this book Since the appearance of the first edition of this publication, numerous decisions have been given under this Act and the first edition which appeared in 1915 could not refer to many decisions under the Act. The usefulness of the book has been maintained by the original plan being adhered to and the references to all the cases English as well as Indian being noted in their appropriate places. It is needless to repeat that all the useful and available information on the subject has been given in the various appendices, as for instance, the Indian Companies Rules, Rules and Regulations made by the Government of India and by the Local Governments relating among others to the duties of Registrars of Joint Stock Companies and Auditors' Certificates. An additional feature of this edition is that the rules framed by the various High Courts and the Judicial Commissioners' Courts under S. 246 of the Act have been given *in extenso* in Appendix II. We should only add that no pains have been spared to make the work useful to all those having to deal with the law relating to Companies in India.

THE INDIAN EVIDENCE ACT, by Subodh Chandra Lahiri, Vakil, High Court, Calcutta.

This is a small book of 196 pages giving the Indian Evidence Act with commentaries referring to the important decisions under each section under suitable headings. The usefulness of this book consists in the ease with which it can be carried in one's pocket and referred to easily without having to wade through learned commentaries of great length. We hope it will be found useful as an annotated pocket edition of the Act.

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MALABAR AND LEGISLATIVE EXPERIMENTS.

I.

Malabar in more senses than one is the land of *Anacharams* or anomalies and offers a congenial field for reformers legal and social, good and bad. The Malayalis educated in an atmosphere antipathetic to the institutions of Malabar are naturally dissatisfied with them and their grievances find a ready response in people outside, specially as it implies an unconscious compliment to their own institutions. The dissatisfaction felt is so keen that, as we shall show presently, any change however ill-considered or unsatisfactory is felt to be better than no change at all. The dissatisfaction is not confined to British Malabar ; it is equally strong in the adjoining States of Travancore and Cochin, and has already found expression and relief in considerable pieces of legislation in those States. The Travancore and Cochin Nair Regulations are instances of such. The Travancore Regulation is, in the main, conservative and makes very few changes. The Cochin Regulation, on the other hand, is thorough-going and effects some radical changes. Agrarian discontent which is partly the result of the social anomalies of impartible joint holdings has been sought to be remedied in those States by the Travancore Jenmi and Kudiyan Regulation and the Cochin Tenancy Regulation. The Malabar Marriage Act and the Malabar Wills Act and the Malabar Tenants' Compensation for Improvements Act are the British counterparts to the legislation of those States. Registration under the Malabar Marriage Act being voluntary, the Act has been largely ineffective and the Wills Act is more or less declaratory. There is no legislation so far dealing with the other portions of family law and the Malabar Tenants' Compensation Act does not cover the entire ground of the legislation in the States of Cochin and Travancore. The deficiency is sought to be made up by two pieces of contemplated legislation, the Tarwad

Management Bill of Mr. Thampan and the Malabar Tenancy Bill of Mr. Krishnan Nair. It shall be our endeavour to consider these two Bills in the course of this and the next article.

In this article we shall deal with the reforms sought to be effected in the family law of Malayalis. The features of that law which are felt to be unsatisfactory are : (1) absence of legal marriage and non-recognition of the claims of wives and children, (2) irregular sexual unions between different castes, and (3) impartible joint holdings with imperfect distribution of the benefits flowing from them, the excessive power and opportunities for enjoyment of the karnavan and the comparatively imperfect scope for enjoyment for the junior members. The Travancore Nair Regulation proceeds somewhat on old lines. It regularises the customary union known as *Sambandham* whether between Nairs only or between Nairs and non-Nairs and gives the wife and children right of maintenance ; in the case of Nair males, it gives rights of intestate succession to half of the separate and self-acquired property in competition with the family and in the absence of such, to the whole of it. It preserves the absolute right of dissolution at will possessed by either spouse, but subject in the case of husband, to liability to make reasonable compensation and in the case of both to the necessity of bringing a suit and having a formal decree dissolving the marriage or having a registered document recording a divorce by mutual consent. In the case of non-Nair males, the right of the Nair wife and children is confined to mere rights of maintenance. In the case of *Putravakasam* property the Regulation raises the presumption of tenancy-in-common with right of partition *per capita*. It recognises rights of testamentary disposition in respect of separate and self-acquired property. As regards karnavan's powers of alienation, representation in suits and incurring debts, the Regulation does introduce considerable innovations, but they are mostly in the nature of providing additional guarantees such as writing, and joinder of senior anandravans. Under the law as understood in Travancore, in the case of sales, leases and mortgages with possession for over 12 years, consent of major members was necessary for their validity. The Regulation adds that the consent must appear in writing. In the case of mortgages with possession for 12 years and less also, similarly, consent was necessary but the Regulation says that that consent may be presumed from the written consent of the senior anandravans of each tavazhi.

In other cases of alienation and debts by the karnavan the presumption used to be that they were binding. The Regulation substitutes instead the rule that in order to be binding the alienation must have been made or the debt incurred alleging necessity and the creditor or alienee must have made *bona fide* inquiries. In the case of decrees, no decree is to be binding unless the karnavan is sued as such and the senior anandravans of all the tavazhis are parties. Like many other enactments dealing with similar topics, this one bears marks of want of due consideration. It is too comprehensive to be regarded as a mere amending Act but is not at the same time sufficiently comprehensive to be regarded as a consolidating Act. The result is utter confusion. The rule as to sales runs as if written consent of all the majors is all that is necessary to validate them, especially having regard to the next section which requires both consent and necessity. But that obviously could not have been the intention. And again, no provision is made for cases where any junior member capriciously dissents or is obstructive. The Cochin Regulation supplies this defect by adding the indefinite expression "wherever possible." Again, the Regulation makes no distinction between moveables and immoveables though the distinction must have been very familiar. In fact the Travancore decisions recognised the absolute power of the karnavan to deal with moveables unlike in the case of immoveables where he had to take the consent of the anandravans. In the case of good many moveables, in the ordinary course of management they have got to be sold ; for instance paddy or fruits gathered from the land or realised as rent. This is recognised in the Cochin Regulation which exempts these from the general rule. But, by making vessels, jewels or all other things except usufructs or grain rent subject to the rule, they make it impossible for the karnavan to so much as substitute a new vessel or furniture by selling an old and useless one without the written consent of his juniors. Before the enactment in question, Courts used to presume the consent of all the members of the family from the consent of the senior anandravan. The Statute adds to it the further precaution of the consent of the senior anandravans of every tavazhi. The Regulation requires both for delegation and renunciation by the karnavan, registered documents.

The Cochin Regulation proceeds on the basis of the Travancore Regulation but is more ambitious. It

imposes the condition of monogamy and in all cases of *sambandham* whether with Nairs or non-Nairs, it confers rights of succession on the widow and the issue. The legislators looked at the question apparently so much from the point of view of Nairs that all unconsciously a discrimination in favour of the Nair spouse and children would seem to have crept in. It is provided that in all cases the widow or children are entitled to 1|2 of the non-Nair husband's self-acquired and separate property. Suppose a non-Nair, governed by Hindu Law had only self-acquired property and had two sons by his caste wife, and one son by his Nair wife. Under this rule, the two sons by the caste wife will take half and that when no corresponding right of succession to his Nair son is reserved in favour of the father. And again as between the non-Nair sons and the Nair widow, the latter would take half though the caste wife even if alive will not have taken any share. It is however, on the question of tarwad management and partition, that the Cochin Regulation has very pronounced features. It starts with declaring the joint proprietorship of the karnavan and the junior members. Unlike the Travancore Regulation it prohibits delegation of karnavan's powers (S. 23). It requires the karnavan to keep an inventory of all the moveables and immoveables of the family and to maintain also a correct account of the income and the expenditure, subject to inspection by junior members, thus approximating his position to that of a trustee. It gives him as a solatium possibly an absolute right to 25 per cent. of the net income (a term undefined) subject to a maximum of Rs. 900. Except with the written consent of all the major members, wherever possible, (without these words, the situation would have been impossible) no sale of tarwad moveables or immoveables, no lease for more than 6 years, no mortgage, pledge or hypothecation of such property or discharge of mortgage is valid. Mr. Thampan's Bill goes one step further and requires, even in the case of debts, the written consent of all the major members. These proposals will be practicable only on the supposition that all the members of the family are actuated by the sole consideration of the benefit of the tarwad, whereas, as a matter of fact, the conduct of junior members as well as that of the karnavan is swayed so often by totally different considerations. With tarwads broken up into tavazhis by the rule as to partition and with the vague words "wherever possible," (which however destroys the value of the check and

introduces considerable scope for perjury which it must have been the intention of the framers of the Act to avoid), the Cochin Regulation may be feasible. Without that, ever so great the impending necessity, it would be in the power of any member mischievously inclined to ruin the family, not to speak of the difficulty, with the best of intentions of procuring the consent of all the junior members having regard to the numerical strength of many tarwads and the not improbable contingency of the members of the family being distributed over the whole of the Presidency or even of India. The approval of a family council composed of the natural heads of the tavazhis is a more feasible proposition and we think is the most hopeful one if families have to be maintained in anything like the present numerical strength. It may be worthy of consideration whether the seniormost ladies also should not be added, for their interest in the tarwad may in 9 cases out of ten be counted on as real and genuine. We cannot think of anything more fatuous than the rule in the Cochin Regulation that all the members of the family should be parties to the suit concerning the family. Under that rule, however *bona fide* the litigation and however efficiently it might have been conducted the failure to make any unconsidered infant a party to the litigation would open up the whole question. In this matter, commonsense is, we think, on the side of the Travancore Legislation. The proposed body as we said is likely to present the most effective check on the vagaries and the frauds of the karnavan. A combination between the heads of various tavazhis is a very unlikely event.

Another very important provision of the Cochin Regulation is that which enables the bulk of the major members of a tavazhi to enforce partition after the life-time of the ancestress or with her consent. The partition is to be *per stirpes* the shares being however calculated *per capita*. In the case of adoption, as in the case of alienations the written consent of all the members is insisted upon. This may be unexceptionable as adoption is not an indispensable matter.

Mr. Thampan is opposed to partition because apparently the experience gathered in the working of the Cochin Regulation which allows partition is not sufficiently encouraging and in addition, compulsory partition however welcome to people wedded to individualistic ideas, must beyond doubt lead to disintegration of families and there seems to be a certain amount of

revulsion of feeling in Cochin against partition. But nobody can completely stem the tide of those ideas and all these enactments, whether they provide for tavazhi partition or for efficient management and equitable distribution of the benefits, can only serve as temporary half-way house measures putting off the evil day, if evil day it is, of individual partition and Makkathayam. They are useful in that they may make the transition easy and life comparatively tolerable in the meanwhile. He would have the theory of trust started by the Cochin Regulation worked out to the full. He would have the written consent of all the major members for all alienations except leases for one year in the case of Verumpatton lands and in the case of kanom lands for 12 years (moveables not excepted) and for all debts. He would insist upon all the members being made parties to suits. He would have no delegation except with the consent of majority of members. He would have the karnavan keep accounts and inventories and he would make him liable for gross negligence as well as wilful default. Out of the net income, that is to say, the gross income *minus* the outgoings for rent, assessment and interest the karnavan is to take five per cent. absolutely for himself. Seventy-five per cent. is to be used for maintenance and the balance is to be invested in specified investments. The whole trouble about these proposals is as we have had occasion to observe already that they don't take note of the normal type. They don't sufficiently take note of the fact that all the tarwads are not rich so as to afford the luxury of an account and an inventory, that indebtedness and quarrelsomeness is the rule and not the exception, that the remuneration of five per cent. on the net income is much too small an inducement to karnavans in most cases, to undertake and carry out faithfully the trust, in short that you cannot convert the family system which is the ordinary mode of life in the west coast into one of perpetual trust. It is the pomp and circumstance, the irresponsibility and the dignity attaching to it that reconciles people to the position of karnavan. A receivership on 5 per cent of the net income with accountability and litigation will be not sufficiently tempting in most cases and far from families being kept intact—disintegration must result from legislation of this sort. Our own idea is that checks like those imposed in the Travancore legislation of the family council with a clear declaration that the karnavan's position is like that of the manager of a

Hindu family and with a power for the karnavan or the junior members to have recourse to Court by a summary proceeding for sanction or for prohibition of alienations upon notice to the heads of tavazhis by way of appeal from the family Council and in the case of a single branch to the other major members must be sufficient protection for junior members. Prevailing ideas as to right of maintenance in Madras cannot be said to err on the side of illiberalness and as a matter of fact are serving as powerful levers to bring erring karnavans to a sense of their responsibility. We are not able to appreciate the wisdom or propriety of the rule that 75 per cent of the net income should be used for maintenance: what is to become of the balance if any portion is unutilised or is it intended that it should be equally distributed ? Such a thing is possible only if separate residence also is contemplated. A scheme of distribution of an aliquot share of income to non-resident members would work a hardship on the resident members. In commenting upon the Cochin and the Travancore Regulations, we have sufficiently indicated our objection to Mr. Thampan's Bill also in so far as it attempts to define the duties and powers of the karnavan to define the investments permitted to the karnavan. It is equally if not more objectionable to prescribe the order and the things on which the karnavan is required and entitled to spend. It is impossible for any legislation to comprehensively enumerate the various heads of necessity and appraise their comparative importance. The question must depend largely upon the circumstances of each case. In the present state of the law it is not even necessary to indicate that education and medical expenses are included in maintenance. The enumeration of these might hamper the discretion of the Courts when other items came up for discussion.

B. SITARAMA RAO.

JOTTINGS AND CUTTINGS.

Juvenile Courts.—But the matter of the Report well deserves the setting which it has received. The Juvenile Court is by no means on the footing of an ordinary Criminal Court—

"The idea of treating the young offender as a criminal is far from the mind of the average Magistrate, and while he seeks to give him a fair trial, he looks not so much to the task of punishing as to that of befriending and helping him to regain his footing. It may safely be said that many of the Juvenile Courts are doing social work of the greatest value."

To ascertain the actual working of these Courts a circular was sent last March to all Courts of Summary Jurisdiction, except those in London (where the conditions were sufficiently known) asking for information on a number of points, such as the place where the Juvenile Court is held, how often it sits, the organisation of the Court, and so on. In the majority of the Divisions (573) the Juvenile Court is held in the ordinary Court, with arrangements for separating the cases. In 380 the Juvenile Court is held on the same premises, but in a different room. Liverpool appears to have been the first to provide a Juvenile Court specially constructed for the purpose, and a photograph of the interior is reproduced in the Report. But for the statistics on the various questions reference must be made to the Report itself. One matter to which attention is called is the need for a medical examination of young people who are brought before the Court. Apart from the importance of discovering physical and mental defects, there is, unfortunately, an additional reason in the prevalence of *encephalitis lethargica,* and the remarkably moral changes it produces. As to the efficacy of birching there is sharp diversity of opinion, but apparently it is not, generally speaking, a deterrent, a conclusion which probably is correct ; and perhaps the same may be said of all corporal punishments.

—*The Law Journal,* August 8, 1925, p. 716.

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MALABAR AND LEGISLATIVE EXPERIMENTS.

II. TENANCY BILL.

In the matter of tenancy legislation also, Travancore has had the lead. The Royal Proclamation of 1042 (1867) declared all kanoms of jenm lands irredeemable. This Proclamation was not apparently the first to deal with the matter for it refers to the earlier instructions of 1002 by the then Ruling Prince to the Court of Appeal regarding the very matter. The Royal Proclamation of 1042 was construed by Courts as not applying to non-Brahmin Jenmis. This defect was remedied by the Jenmi and Kudiyan Regulation of 1071 (1896). This Regulation as well as the earlier Proclamation regulates only the relations between the kanomdar and the jenmi under whom he holds. Jenm land is defined as land which is either entirely exempt from the Government tax or if assessed to revenue is subject only to payment of Raj-bhogam, occupancy right in which is created for a money consideration (kanom) and is also subject to the payment of customary dues and the periodical renewal of the right on payment of certain fees. In other words, the land must be jenm land and the tenure must be one having the following incidents: (1) it must be created for consideration; (2) it must be subject to payment of micharom and other customary dues; (3) it must be subject to renewal. If any of these conditions do not exist, the Regulation does not apply. For instance, it would not apply to usufructuary mortgages nor to sub-kanoms nor to transactions which reserve no micharom nor to those which expressly provide for redemption at a particular period without contemplating a renewal. Certain kinds of transactions were presumably subject to renewal and what this Regulation provided—as its predecessor also did—was to make them irredeemable. The Regulation does not apply to any

kanom created after 1042 which expressly provides for redemption. In the case of contracts entered into for the first time after the Regulation the question whether the tenure is terminable or not is to be determined on the construction of each contract.

In cases governed by the Regulation it declares the tenure to be permanent, heritable, and transferable, but subject to forfeiture for non-payment of rent for 12 years or renewal fees for one year, wilful denial of title persisted in even at the first hearing of the suit, and wilful waste. In the first and third cases, the forfeiture is relievable on certain conditions. On eviction in these circumstances, the tenant is entitled to improvements. The tenant may surrender at the end of each term of twelve years on payment of arrears of rent but then he forfeits all claim to improvements. Failing surrender, the tenant is bound and entitled to obtain a renewal on payment of the customary fee. There are also provisions for enhancement and reduction of micharom and also for reduction of interest on the kanom under certain circumstances. Enhancement of micharom is subject to the rule that the pattom shall not exceed one-fourth of the gross produce. Arrears of micharom and renewal fees are declared a charge on the holding. Such in brief are the provisions of the Travancore Tenancy Regulation. It gives, in fact, effect to one theory of kanom and acting on the presumption that old kanoms were irredeemable declares them to be such and as to the future leaves parties at liberty to say whether they are to be redeemable or not. The Regulation proceeds on cautious, conservative lines and causes least disturbance.

The Cochin Regulation of 1914 proceeds on much the same lines, though it includes also a comprehensive measure dealing with compensation for tenants' improvements on the lines of the Madras Act of 1900. So far as the conferring of permanent occupancy is concerned, it restricts its benefit to kanom tenants, whose tenure originated before 1884. It provides for eviction in the following cases :—(1) On non-payment of rent for three years ; (2) on non-payment of renewal fee for one year ; (3) on refusal to pay enhanced rent or enhanced kanom ; (4) on a wilful denial of title ; (5) on a wilful waste ; (6) on assignment or transfer without notice to landlord ; and (7) when the landlord wants land for *bona fide* purpose of extending his residence or for agricultural improvement involving outlay which the tenant would not or

could not undertake. Like the Travancore Regulation, this one also provides for increase or reduction of micharom under certain circumstances. The landlord is also entitled to an enhanced kanom up to twelve times the micharom or interest at the old kanom rate. The renewal fee is fixed at 27 1|2 per cent. of the kanom. Arrears are declared a charge. Here again, we find no comprehensive legislation conferring occupancy rights on tenants generally or even on kanom tenants generally. It only recognises the rights of ancient kanomdars to fixity of tenure; it purports to right an ancient wrong, and does no more.

Mr. Krishnan Nair's Bill goes much further. In the first place, it confers right of occupancy on all kanoms irrespective of their date. It also confers rights of occupancy on ordinary lessees and sub-lessees in occupation for six years and more including persons who *bona fide* believe themselves to be such and are in possession. This is apparently without reference to the person under whom they hold. The usufructuary mortgagee might be in possession and might have introduced a lessee. Though the mortgagee himself is liable to be redeemed the lessee under him is apparently entitled to claim permanent occupancy. If the rulings under the Tenants' Compensation for Improvements Act should be applied, persons coming in under invalid leases or invalid kanoms might claim the benefit of the Act. One noticeable provision is that the landlord may resume lands in occupation of lessees other than the tenants' homesteads for *bona fide* cultivation by himself. This provision is felt necessary by reason of the application of the Act without reference to the means and the position of the landlords. They might themselves be cultivators temporarily unable to carry on cultivation. They might be lessees or they might be small proprietors and the leasing might have been due to temporary causes. They might be people who have not lost their *animus revertendi* to agricultural pursuits. Without a provision like this, to confer occupancy rights on all tenants would have been a real hardship on the landlords and would have meant only the creation of one set of discontent in place of another. One is not certain if the Bill even with this provision will not have that effect. The question of conferring occupancy right on all tenants is bound up with many difficulties. Just as over-concentration of land is an evil, over-division is equally so and the Legislature should note the danger ahead in the course suggested of conferring

occupancy rights on all tenants. Already holdings are very small and further division might reduce their size still further. The loophole left by Mr. Krishnan Nair's Bill has this grave objection that it takes away the fixity of tenure conferred with one hand, with the other. Again, there is not much good in conferring fixity of tenure on the modern scale of rents except in the case of large estates where old tenants continue and the tenants' interest is substantial. A provision for interfering with rents with a view to bringing them down to an equitable level has its dangers in that you cannot do that without trenching on many small incomes. It will be found that in many cases because agricultural incomes of these landlords were felt to be inadequate for their support, they had to abandon their agricultural occupation. The problem would be much easier if legislation is restricted to bigger estates and to tenants immediately under such estate holders or, in the alternative, to those in actual occupation. If the object is to destroy monopoly in land a schedule of big estates might well be compiled in which legislation on the lines of the Estates Land Act might be undertaken conferring occupancy rights on all tenants in actual occupation or what is undoubtedly a more just course, introducing a compulsory system of sale of the occupancy after the manner of S. 46 of the Estates Land Act. We would deprecate the creation of a tangle of permanent interests in land like those of the jenmi, the kanomdar, the sub-kanomdar, the lessee and sub-lessee at the same time, all permanent. We would much rather prefer only two interests, the jenm and the occupancy to be recognised. The kanomdar must be redeemed or at least the redemption value must be fixed and the interest set off as against a new equitable rent on a fixed proportion basis of the yield.

There is a possibility of fixing such a rent in the case of the kanomdar, the assessment of the rent being always on more favourable basis in his case than in the case of the verumpattomdar. Kanomdar as such has no special claims to differential treatment except perhaps in the case of very ancient kanoms which are not many. In other cases, his claim when he is non-cultivating is no higher than that of any other class of tenants. If conferring occupancy right is determined upon, the proper thing to do is to confer occupancy right on every tenant in occupation without reference to the circumstance whether he is a kanomdar or verumpattomdar or some other

kind of tenant. But if occupancy is to be made the basis of the grant, a question might arise whether cessation of occupancy should not lead to its extinction. With that we introduce the complication of non-occupancy tenure under the Bengal Tenancy Act. Such complications will take away from the value of land enormously and, in so doing, the Legislature might possibly be removing one of the very incentives for improvement.

B. SITARAMA RAO.

SUMMARY OF ENGLISH CASES.

PRITCHARD *v.* BETTISFIELD COLLIERY, LTD., (1925) 2 K. B. 284.

Workmen's compensation—Death—Compensation to dependants—Illegitimate grandchild—Workmen's Compensation Act, 1923, *S.* 2.

A workman in a colliery was fatally injured while he was getting coal at the coal face and died leaving a widow and an illegitimate grandchild under the age of fifteen, wholly dependent on his earnings. The question arose whether additional compensation was payable in respect of the illegitimate grandchild. *Held,* it was payable as S. 2 of the Workmen's Compensation Act, 1923, was intended to increase the amount of compensation for the benefit of all the persons who were actually dependent upon the earnings of the deceased workman irrespective of their legitimacy.

ELLIOTT *v.* BAX-IRONSIDE, (1925) 2 K. B. 301.

Bill of Exchange—Acceptance of bill and indorsement by Directors of a Company—Personal liability—Bills of Exchange Act, S. 26 (2)*—Endorsement—Construction—Surrounding circumstances if can be looked into.*

A bill of exchange drawn on a Company was accepted as follows :—" Accepted payable at .....Bank. X and Y, directors of .....Company." In pursuance of a requisition from the drawer that the bill of exchange should be indorsed by the directors as well as accepted by the Company, there was an indorsement on the back " . . . . Company. X and Y directors." In an action against X and Y as indorsers, *held,* they were personally liable.

Where a signature appears on a bill of exchange or promissory note, the word " directors " following the signature is a word of description only. Under S. 26 (2) of the Bills of Exchange Act, which says "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted " the personal liability of the directors is the one most favourable to the holder.

Per Bankes and Scrutton, L. JJ.—For the purpose of construing the indorsement it is permissible to take into consideration the circumstances under which it was made.

SHARPE *v.* SOUTHERN RAILWAY, (1925) 2 K. B. 311.

Negligence—Invitation to alight—Passenger getting down without looking—Injury—Contributory negligence.

A train which arrived at a platform being longer than the platform, the carriages at the back stood outside it. A porter shouted to the passengers therein to keep to their seats. The plaintiff who was asleep in one of those carriages did not hear him, woke up suddenly and without looking out to see if he was near the platform got out in a hurry and fell down and broke his leg. He sued the Railway Company for damages. *Held,* they were not liable, the injury being due to his own contributory negligence. In order to succeed in such cases, a plaintiff has to show that the Railway Company gave him an invitation to alight at that spot under circumstances which made it negligent in them to give it.

Per Scrutton, L. J.—The mere fact of a train stopping at or near a station which is a man's destination is not, without more, an invitation to alight without looking.

In re GIBBS AND HOULDER BROTHERS AND CO. LTD.'S LEASE : HOULDER BROTHERS AND CO., LTD. *v.* GIBBS, (1925) 1 Ch. 575.

Landlord and tenant—Covenant against assignment—Permission of landlord necessary but not to be withheld unreasonably—Assignment proposed to be made in favour of another tenant—Prospect of losing a tenant—If good ground for refusing leave.

Under a covenant in a lease, the lessee was not to assign the premises without the written consent of the lessor, nor was

the latter to withhold his consent unreasonably if the proposed assignee were respectable. Permission was asked for assigning the term to a tenant of the lessor and the latter refused permission on the sole ground that he would thereby be losing a good tenant and find it difficult to get another tenant. *Held*, the refusal of permission was unreasonable. (1925) 1 Ch. 198 affirmed.

CURTIS *v.* OLDHAM, LTD., 94 L. J. K. B. 655.

Income-tax—Company—Deductions—Bad debts—Defalcations by Managing Director—Income-tax Act, 1918, *Sch. D, Cases I and II, R.* 3.

Where owing to the defalcations of the Managing Director of a Company a large sum of money had been found due from him to the Company but it was found that it could not be realised, it could not be considered as a loss connected with and arising out of the trade and as such was not a permissible item of deduction.

BUERGER *v.* CUNARD STEAMSHIP COMPANY, 94 L J K B 697.

Shipping—Bill of Lading—Exception clause—Deliberate deviation—Effect of—Loss of goods—Liability of shipowners.

A Bill of Lading under which goods were shipped contained a clause that in the case of packages containing goods of more than £20 value, the shipowners were under no liability unless the value of the goods was expressed therein and extra freight paid. Packages containing goods of more than £20 value were sent, but the price was not stated in the bill nor extra freight paid. The shipowners deviated from the contract deliberately and discharged the cargo at places different from what was agreed to between the parties. The goods being lost, there was no delivery to the consignee. In a suit for damages, the shipowners pleaded the exemption clause in the Bill of Lading. *Held, by the Court of Appeal reversing the decision of Rowlatt, J.*, there having been a deliberate deviation from the stipulated clauses, the exception clause was not available to the shipowners and they were liable in damages.

BETTS *v.* CLARE AND HEYWORTH LIM. 94 L J K B 734.

Income-tax—Company—Profits— Ascertainment of — Three years' period not available—Broken period—Income-tax Act, 1918, *Sch. D, Cases 1 and 2.*

A firm began to do business for the first time on 1st March, 1919, and according to its statement of accounts made a profit of £1,000 up to the end of December, 1919. The business was sold to a Company as from 1st January, 1920, and the accounts of this Company showed a profit of £12,150 for the three months ending with 31st March, 1920. In assessing income-tax for the year ending 5th April, 1925, the question arose as to the mode of computation. *Held,* as the three years' period for calculating the average income was impossible in the case, the period over which the average should be calculated could only be the period antecedent to the year of assessment, *i. e.,* 1st March, 1919, to the end of December, 1919, and not the thirteen months' period from 1st March, 1919, up to 31st March, 1920, for which accounts were taken.

HOLLAND *v.* HOLLAND, (1925) P. 101.

Divorce—Non-access— Evidence of husband —Admissibility—Still-born child.

In a petition for divorce on the ground of the wife's adultery proved by the birth of a still-born child there was no evidence except that of the husband to show non-access and therefore that he could not have been the father of the child. *Held,* the child having been still born, there was no child which could be bastardized by the evidence of the husband and therefore the rule laid down in *Russell* v. *Russell* (1924) A. C. 687 did not apply to make such evidence inadmissible.

JOTTINGS AND CUTTINGS.

The Probation System.—The section of the Report dealing with Probation naturally calls attention to the extension which the system is to receive under the Criminal Justice Act. Probation as a statutory system is quite modern. It may have had its origin in the practice of postponing sentence or of binding to be of good behaviour, but the first statute directly authorising it seems to have been passed in Massachusetts. That was in 1878, and the statute applied only to Boston. In 20 years the system had been applied in all the Courts of that State, and in the early years of this century it had become practically universal in the United States. In this country it commenced with the Probation of Offenders Act, 1907, and

amendments were made by the Criminal Justice Administration Act, 1914, which also provided for official recognition being given to Probation Societies, and for a contribution out of public funds. But the system has failed of full effect largely, it seems, through lack of proper organisation. It is this organisation which the Criminal Justice Bill is intended to secure.

—*The Law Journal*, August 8, 1925, p. 716.

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An Unintentional Marriage.—The case of *Valier* v. *Valier*, reported in the *Times* of July 10, adds another to the remarkable series in which one party to a properly celebrated marriage afterwards petitions for annulment on the ground that he (or more usually she) did not understand the nature of the ceremony. In *Ford* v. *Stier* [(1896) P. 1] and *Hall (otherwise Barrar)* v. *Hall* [(1908) 24 T. L. R. 256] the lady was the petitioner, the first being a marriage in church, the second before a Registrar. Each was successful on the ground that, although she answered the usual questions, she thought she was going through a betrothal ceremony. In the case of Valier, the " husband " was the petitioner, and his marriage was annulled for the same reason. The success of a male petitioner in such a case is very unusual, but he was an Italian, and in his native country there is a ceremony of " solemn espousal, " an exchange of promises which does not effect a marriage. That circumstance, and his ignorance of English, enabled him to obtain his decree. In each of the above-mentioned cases the marriage was unconsummated, and in the latter case the Judge gave considerable weight to that fact. If the " arrangements " contemplated in S. 2 of the Marriage with Foreigners Act, 1906, had been in working order, and the petitioner had had to procure a certificate of no impediment, the nature of the ceremony might perhaps have been brought home to him. But, for whatever cause, this section appears to be a dead letter. It is certainly undesirable that a foreigner who is party to an English ceremony of marriage should afterwards plead ignorance of its nature, and the case is worth the attention of the Foreign Office.

—*The Law Journal*, August 8, 1925, p. 717.

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Lord Hewart and Probation.—Lord Hewart, in his address, emphasised, not for the first time, the importance of avoiding sending young persons to prison and for making use of

probation. " Grave was the responsibility of those who, otherwise than in a case of clear necessity, sent any youth or girl to prison for the first time." Probation he referred to as a method the value of which could hardly be exaggerated, and its opportunities had by no means as yet been fully explored. This no doubt will be altered when the Criminal Justice Bill, with its new organisation of the probation system, becomes law. We notice that in the recent estimate of the expenditure involved in this session's Government Bills, there is an item " Contributions towards expenditure by Local Authorities on Probation System, £22,250 in 1924-25 ; £40,000 in 1925-26; and £50,000 a year when scheme is in full operation." It is little enough when we see the vast sums expended in far less helpful ways, and there is added :—" Note.—It is anticipated that this expenditure will eventually lead to a substantial decrease in expenditure on prisons." Lord Cave and Lord Haldane's address we must defer.

—*The Law Journal,* August 15, 1925, p. 734.

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The Indeterminate Sentence.—We referred last week to the addresses of Lord Oxford and Lord Hewart at the recent International Prison Congress. The former dealt with uniformity of sentences; the latter with the probation system. As to this system, we have pointed out that it has come to us from America, and another American experiment, the indeterminate sentence, formed the subject of Lord Cave's address. The indeterminate sentence is based upon the theory that the object of punishment is to reform. If punishment is a remedial treatment, you must continue it until the cure has been achieved, and no longer. A definite sentence is as much opposed to this principle as if a doctor was to say beforehand how long his treatment was to last. Lord Cave, according to the report of his address in the *Times* of the 8th instant, said that the system obtained in thirty-seven States of the Union. If so, there must have been a great extension since the account given in " English Prisons To-day " (1922). It is there said that no American Legislature has yet been induced to enact a really indeterminate sentence. All that has been done is to permit a sentence with a minimum and a maximum term. A prisoner must serve the minimum term, after which he may be released on parole. This comes near to the preventive detention which was introduced here by the Prevention of Crime Act, 1908, the preventive detention following on a period of

at least three years' imprisonment, and, indeed, Lord Cave seems to have treated the two systems as the same. For preventive detention, Camp Hill Prison, in the Isle of Wight, is used, and here the life of the prisoner gradually approximates to ordinary life. But Lord Cave speaks of the results as unsatisfactory. He refers to the Report of the Prison Commissioners for 1923 to 1924, as showing that out of 377 discharged from Camp Hill since the system was commenced, about two-thirds had been reconvicted or reconfined. He regards the application of the system at the Borstal institutions as more hopeful, and it is natural that the young should prove more amenable to remedial measures. Lord Haldane, in his address, suggested that, on a true theory of punishment, it must be accepted by the criminal as the just expiation for his crimes, and in this lay its influence for reform. But we doubt whether practical prison administration lies that way.

—*The Law Journal*, August 22, 1925, page 746.

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A Retiring Age for Judges.—Mr. Laski also discusses the question of the appointment of Judges. In place of the system of nomination by the Lord Chancellor, he suggests that the appointments should be made on the recommendation of a Minister of Justice, and with the consent of a standing committee of Judges. He refers, too, to the question of a retiring age for Judges. "A Judge," he says on this point, "is, I imagine, in the first five years of his service fairly convinced that most of his opinions are wrong in critical cases; in the second five years he will be equally convinced that they are right; and afterwards he will bear himself with serenity whether they be right or wrong. When that serenity becomes habitual, it is time for him to retire." There are, he adds, Judges who, even at eighty, are capable of doing magnificent work; but, in general, seventy might be a suitable age for compulsory retirement from the Bench. Given physical strength, Mr. Laski probably puts the age too low.

—*The Law Journal*, August 29, 1925, p. 759.

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Bridge.—Mr. Justice Swift, in the Court of Criminal Appeal, again called attention to the anomaly of the law of gambling which results in a game of cards by the roadside for small stakes being an offence and a game of bridge, in one's own rooms, a "respectable amusement," whatever the stakes may be.

—*The Law Journal*, August 29, 1925, p. 767.

Measure of Damages.—The jury, in a recent case, was invited on behalf of plaintiff who had been burnt during hair-dressing, in assessing damages to take into consideration the fact that she had suffered disability "in regard to dancing, swimming and all kinds of sport," which would exercise a serious effect upon her matrimonial prospects.

—*The Law Journal,* August 29, 1925, p. 767.

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Bombing from the Air.—We took occasion recently (*ante,* p. 762) to comment on the inclusion in the British Year Book of International Law of a paper on "The Doctrine of Air Force Necessity." We are aware that the writer attempted to qualify his advocacy of warfare from the air by "the condition that non-military property should be destroyed only when innocent lives were not incidentally sacrificed." This, however, is a qualification which all experience, during the war and since, has shown to be impracticable. We recur to the subject because of the bombing operations which have been and are being carried out in the war of Spain and France upon the Riffi, and we notice with interest the protests made in the *Spectator* last Saturday, and in an article by Mr. A. S. Moss-Blundell in the *Nineteenth Century* for this month. "The villages, it is said," we are quoting from the *Spectator,* "have been bombed persistently. This seems to be taken for granted as a necessary act. It is an evil legacy of German unscrupulousness in the Great War. We suppose it must be admitted that all The Hague Conventions have been swept into disuse." Mr. Moss-Blundell, who writes with intimate knowledge of the Riffi—in his view "a brave and valiant people struggling to be free"—says:

"I spent some months last winter in Tangier, and it used to make my blood boil to see Spanish aeroplanes leaving neutral territory daily to fly over Anjera hills and drop bombs upon defenceless villages, from which all the fighting men had gone to the front, and to hear of them actually mining the paths leading to these villages and so causing the death of innocent women and children."

We are not writing for the purpose of accusing any nation in particular. The same may be said whenever bombs from the air are used. The *Spectator* may be right in supposing that The Hague Conventions have been swept into disuse, but this is only in the same sense that International Law was said during the Great War to have suffered eclipse. The only effective protest, it seems, that can be made is by lawyers who

are interested in the development and maintenance of International Law, and if the present practices of European nations as to aerial warfare cannot be stopped, Grotius and his successors will have lived and written in vain.

—*The Law Journal*, September 26, 1925, p. 809.

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Viscount Cecil and the League of Nations.—The League of Nations achieves gradually the attributes of a "going concern," and, if the social commentator of the London *Evening Standard* be correct, Geneva is now, at Assembly times, a highly fashionable resort, an indication curious, but significant, of accruing substance and importance of the League. Moreover, "Mosul" affairs afford something of a crisis, and altogether Geneva comes to occupy a very much more real and lasting place in the popular interest than it did at the inception of the great enterprise five years or so ago. We wonder how many of our profession realise how essential a factor to the first birth of the League was Robert Cecil's extraordinary personality? To be in Geneva before, and at, the first Assembly, was to realise vividly the even chance that the whole conception might well, on the first practical test, collapse in an atmosphere of clamant idealism and politely suppressed ridicule. On paper it all seemed wonderful enough, but in actual fact the expedient of assembling a vast number of politicians to sit in a town hall, and to look intelligent while speeches were made in languages mostly unknown to them, was felt, as it approached realisation, to be at least hazardous. As the representatives assembled, a sense of apathy, incompetence, disability and even dislike was at first prevalent, and one felt that President Wilson's idea might well in the absence of President Wilson be a dismal failure. Very soon it became evident that hopes of vitality and reality were largely centred on Lord Robert: the impression of the time was, as we clearly recall it, that with his coming to the *Hotel Beau Rivage* the whole atmosphere noticeably improved, and that upon his official appearance, there spread a contagion of enthusiasm, happily relieved by that sense of humour which is in reality a sense of proportion, and which clears the vision, eliminates all pose, and enables gradual realisation even of the greatest projects. If this be a true assertion, it cannot be denied that, Lord Robert being essentially a lawyer, it is a great tribute to our legal profession; any man may satisfy himself that the assertion is a true one, in the first place by taking the opinion of other eye-witnesses of that

first Assembly, and in the second place by reading the leading articles on front pages of contemporary issues of that admirable publication *The Journal de Geneve.*

—*The Law Journal*, September 26, 1925, p. 810.

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The Moot.—The prospective revival of moots in the Middle Temple Hall next term has produced from a correspondent to the London *Daily Telegraph* some interesting reminiscences of old-time "moots." At one time these were a regular feature in the life of the Inns of Court, but to-day only Gray's Inn continues it as a result of the determined and successful effort, in 1875, of His Honour Judge Russell, Q. C., Bencher of the Inn and founder of the Inn's Moot Society. Our historian, studying the Moot Book, discovers in the more recent past a record of Montague Lush arguing some forty or fifty years ago that "A.," who procured a man's conviction and hanging on a spurious charge of murder and by giving false evidence, should himself be convicted of murder, and Mr. Rose, once a London Magistrate, giving a decision epitomised in the book thus, "*sus. per. coll.*"; he finds record also of one Mr. Haldane opposing one Mr. Upjohn, one Mr. Montague Cookson being opposed by one Mr. George Cave, and of Mr. Frank Lockwood presiding over a trial in which one Mr. H. E. Duke appeared for the prosecution. All these encounters took place at a date much nearer to 1875 than it was to 1925 ; perhaps it is as a result of the practice the moots afforded, and the aplomb they produced that these men, then young and, no doubt, struggling, reached the heights. The only one no longer with us is Mr. Cookson, who afterwards became Mr. Crackenthorpe.

—*The Law Journal*, September 26, 1925, p. 811.

BOOK REVIEWS.

A TREATISE ON THE LAW IN BRITISH INDIA RELATING TO THE TRANSFER OF PROPERTY, by Mr. H. K. Mukherjee, Vakil, High Court, Allahabad, with a Foreword by Mr. Justice Walsh.

This book which states the principles underlying the Transfer of Property Act will be useful as a preliminary guide to the study of the Act itself. The principles of the Law of Property are dealt with in their logical order in a manner which will be easy to the student of law to study and assimilate. Such a study will enable the student to correlate the various sections

of the Transfer of Property Act and appreciate their proper import. We therefore recommend this small work to the beginners in law.

THE CIVIL PROCEDURE CODE, by A. C. Ghose, M. A., B. L, Vakil, High Court, Calcutta. Published by Ray & Ray Chowdhury, Calcutta. Price Rs. 4.

This publication gives the bare Act of the Code and the Schedules and the Appendices to the same. The amendments of the Code are fully brought up-to-date and there is also given short notes of some of the most important recent decisions under some of its provisions. It is sometimes felt by a busy practitioner that elaborate commentaries intervening between the several sections to some extent do not tend to bring out clearly the bearing and effect of succeeding sections on the previous ones. A publication of the bare Code facilitates the grasp of the bearing of the sections to one another. The references to the sections of the old Code and of the rules of the Supreme Court will, we are sure, be found useful. We think that if the alterations, amendments and additions made by the various High Courts under their rule-making power had been embodied the utility of this book would have been greatly enhanced. Even as it is, there is no doubt that the book will be found of great use.

THE LAW OF CONFESSIONS, by S. Roy, 5th Edition, 1925. Published by the Eastern Law House, Calcutta. Price Rs. 6.

The usefulness of this book is sufficiently indicated by the fact that the fifth edition of the work has now been called for. This edition is practically a new book on the subject with the matter considerably enlarged and recast in many respects. Over nearly 500 new cases, English and Indian, have also been incorporated. The book is self-contained in all respects giving all information including the rules of the High Courts, the police regulations and all other connected matters bearing on the subject. We have no doubt that the book will be found of great assistance by Criminal Lawyers, Magistrates and Judges.

THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA, by S. M. Lahiri, M. A., B. L., 1925. Published by the Eastern Law House, Calcutta. Price Rs. 6.

In this book the author has given us commentaries critical and explanatory on the Specific Relief Act with reference to

the leading English decisions explaining the principles of equity and also noting and commenting upon the Indian decisions up-to-date. The reference to the English decisions of authority embodying the principles of equity relating to the law of specific and preventive relief is absolutely necessary for a correct understanding of the Specific Relief Act which is mainly a reproduction of the leading principles of Equity Jurisprudence and the discussion of those principles by the author with reference to the cases is bound to be useful to the practitioner and the student. In recent years many important decisions by the Privy Council and by the High Courts in India have been given applying the principles to Indian conditions as, for instance, to the cases of joint family and Hindu widows and reversioners ; and the learned author has considered in these pages the effect and true scope of those decisions. The book is bound to be useful as it is not a production giving merely a list of cases on the subject but examines them critically and with reference to the underlying principles.

THE PENAL LAW OF INDIA, by Sir H. S. Gour, 3rd Edition, 1925. Published by Messrs. Butterworth & Co., Calcutta.

Sir Hari Singh Gour's *Penal Law of India* has already taken its place as a leading treatise on the subject and it is therefore hardly necessary to deal with its merits at any length. Since the publication of the last edition of this work both the Indian Penal Code and the Criminal Procedure Code have undergone considerable alterations necessitating the present edition. There has also been a large mass of case-law under the Penal Code which though not most of first-rate importance has got to be noticed in the appropriate places. One of the most important pronouncements on the Penal Code by the Privy Council which sets at rest a good deal of conflict is the recent decision in *Barendra Kumar Ghose* v. *Emperor*, 52 Cal. 197 dealing with the liability by one of several persons for a criminal act done in furtherance of their common intention and discussing the scope of Ss. 34, 114 and 149 of the Code. We don't find this case noticed in the present edition although the decision was given as early as October, 1924, and was published in the authorised series in March this year. This decision would require a re-writing to some extent of the commentaries to those sections. We have no doubt that the bench and the bar will find the present edition as useful for their work as the previous one.

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AUTHORITY TO ADOPT GIVEN BY AN INVALID WILL.

Kondapalli Vijayaratnam v. *Mandapaka Sudarsana Row*; I. L. R. 48 M. 614 : 49 M. L. J. 247 (P. C.).

The tendency of the Privy Council in recent years has been in the direction of a strict interpretation and rigorous enforcement of the provisions of the Indian Statute Law prescribing formalities in connection with documents [cf. *Shamu Pattar* v. *Abdul* (1), *Jambu Prasad* v. *Muhammad Aftab Ali Khan* (2), *Amba* alias *Padmavati* v. *Srinivas Kampthi* (3), *Biswanath Prasad* v. *Chandra Narain* (4) and *Ma Shwe Mya* v. *Maung Ho Hnaung* (5)], so much so that the Legislature has had occasionally to step in to mitigate the possible hardship. [*Cf.* Act XVII of 1917 : S. 23-A of the Registration Act and Act XXVI of 1917 : The Transfer of Property Validating Act]. We feel constrained to say that the decision in *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Row* (6) carries the rigour of formalism even further than the cases cited. A will executed many years ago and in fact registered by a competent public officer, and an adoption made some years before suit on the strength of the authority contained in that document are now set aside by their Lordships on the ground that though in form a will, the document is not, in the eye of the Law, a 'will,' and that notwithstanding its registration, it cannot avail even as an authority to adopt, because the document was presented for registration not by the widow (the donee of the power) but by some other relation who was only a legatee under the will. The conclusion is all the more regrettable in view of the fact pointed out by the Courts in India that the parties who contested the will had accepted and acted upon it

1. (1912) I L R 35 M 607 : 23 M L J 321 (P C)..
2. (1914) I L R 37 A 49 : 28 M L J 577 (P C).
3. (1921) 26 C W N 369 (P C).
4. (1921) I L R 48 C 509 (P C).
5. (1922) I L R 50 C 166 ; 44 M L J 732 (P C).
6. (1925) I L R 48 M 614 : 49 M L J 247 (P C).

for many years [see *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Rao* (7)]. The question of the testamentary character of the document became material in the case by reason of the rule in the Registration Act insisting on the registration of a power to adopt, except when it is contained in a will. Two points were therefore raised before their Lordships, (1) whether the document was a will and (2) whether the registration which in fact had been effected was in conformity with law.

That the mere fact of a document being called a will does not suffice to give it the effect of a will for all purposes is now too well established to be doubted. [*Thirugnana Pal* v. *Ponnammal Nadathi* (8); *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9)]. We may, however, point out in passing that their Lordships were scarcely justified in making a point of the fact that their decision in *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9) was not before the High Court when dealing with the present case, because Sir John Wallis, C. J., who took part in the High Court judgment had himself laid down the same proposition when *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9) was before the High Court. See *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (10). In the case under notice the document in question not only purported to be a will but did contain posthumous dispositions of property, though these dispositions could not take effect, because the executant (notwithstanding that he was aged 19) was a minor under S. 3 of the Indian Majority Act as he was under the guardianship of a Court guardian. The tenor of some of the observations in the judgment and the reliance placed on the definition of a 'will' in the Indian Succession Act would seem to suggest that in their Lordships' view every testamentary document whose dispositions are wholly void and cannot take effect must be held not to be a 'will' even for the purpose of S. 17 (3) of the Registration Act. It is, however, well established that the mere fact of the ineffectiveness of the dispositions does not take away the testamentary character of a document. There is a well-recognised distinction between the complete absence of testamentary capacity in the executant and the absence of capa-

7. (1920) 60 I C 146 : (1920) M W N 684.
8. (1920) 25 C W N 511 (P C).
9. (1921) I L R 44 M 733 : 41 M L J 648 (P C).
10. (1919) M W N 52.

city in him to dispose of the properties dealt with by the will. In England the question has arisen in another form in connection with applications for probate of wills of married women, it being formerly the rule of the English Law that a married woman had no independent testamentary power unless she was possessed of separate property. In the view of the English Courts, it was for this purpose only necessary to enquire whether she had any separate property at all so as to give her a testamentary capacity and not whether all the property mentioned in the will was property over which she had a power of disposal by will. [Cf. *Thorpe* v. *Macdonald* : *In the Goods of Thorpe* (11)].

How exactly a distinction of the above kind will be applied by their Lordships to different conceivable cases in India, it is not possible to gather from the tenor of the judgment under notice. The inoperativeness of the will in the present case no doubt arose from the minority of the executant—it was a case of absolute testamentary incapacity so that a Court of Probate would have been justified in refusing probate of the will. But take the case of a member of a Mitakshara joint family executing a will disposing of his undivided interest in the family property and also authorising his widow to adopt. If the will dealt with no other property, it would be wholly void as a 'disposition,' and if he had no separate property besides, his position will almost resemble that of the married woman under the former English Law. The owner of an impartible zamindary in this Presidency with no other personal property will be another instance of the same kind. Is it to be held in such cases that even the authority to adopt contained in the will cannot be availed of by the widow, unless the document had been registered ? This contention was summarily rejected by Tyabji, J. in *Bachu* v. *Kusal Doss* (12). Though his decision as to the validity of the adoption was confirmed on the Appellate Side [*Bachu* v. *Mankore Bai* (13)] and by the Privy Council in *Bachu* v. *Mankore Bai* (14) this point does not appear to have been raised or dealt with in the appeal. The argument was 'tentatively' put forward before the Privy Council in *Venkatanarayana* v. *Subbammal* (15) and was answered by the observation that the will was executed by a testator who *at its date* could dispose of the property of which

11. L R (1878) 3 P D 76. 12. (1902) 4 Bom L R 885.
13. (1904) I L R 29 B 52. 14. (1907) I L R 31 B 373 (P C).
15. (1915) I L R 39 M 107 : 29 M L J 851.

he purported to dispose—a co-parcener came into existence in that case only by an adoption subsequent to the date of the will. This remark seems to suggest that if the other co-parcener had been in existence at the date of the will, the objection might have prevailed.

We must, however, say that it does not seem to us logical or satisfactory to base the conclusion on the presence or absence of co-parceners at the date of the execution of the document. Let us take a case where a member of an undivided family makes a will disposing of his share in joint family property but his co-parceners predecease him or he becomes divided from them : then undoubtedly the dispositions in his will can take effect and it will be strange indeed if in such a case, notwithstanding the ultimate effectiveness of the will, a power of adoption therein contained cannot be availed of in the absence of registration. Whether a will executed by a person when under age *ipso facto* becomes valid on his living beyond the age of majority does not appear to have been decided. In respect of a will made by a testator, while *non compos*, it is stated in Williams on Executors, 11th Edition (page 150) that the will does not obtain any force by the mere fact of the testator subsequently recovering his understanding—though if republished after such recovery it would become a valid will

Under the English Law as it stood before 1893, a will made by a woman during coverture, disposing of property over which she had no power of disposition during her husband's lifetime did not become effective by the mere fact of the husband pre-deceasing her, but this rule has been changed by S. 3 of the Married Women's Property Act of 1893.

There still remains the further question whether for the purposes of the application of the rule in the Registration Act, a Court will be justified in taking into account all the considerations which may be relevant in a Court of Probate. It is a well-established principle that in applying the provisions of the Registration Act the Court is only concerned with what a document on the face of it purports to be and not with its actual operation in the circumstances of particular cases. [Cf. *Ramaswami Aiyar* v. *Thirupathi Naick* (16)]. In this connection the difference between the language of the definition of a ' will ' in the Succession Act and that in the General Clauses Act is worth noticing—especially as the Registration Act itself contains no definition of a ' will ' and it is the General Clauses

16. (1903) I L R 27 M 43: 13 M L J 356 (P C).

Act definition that must accordingly govern the determination of the present question. The Privy Council cite both the definitions but they seem to proceed on that contained in the Succession Act, for the definition in the General Clauses Act does not import the 'legality' of the document. Though it is an 'inclusive' and not an 'exhaustive' definition, it will be satisfied by any writing "making a voluntary posthumous disposition of property." That a testamentary declaration by a person under age may for certain purposes be spoken of as a 'will' is indicated by the provision in S. 47 of the Succession Act itself, enacting that a father, *whatever his age may be,* may by *will* appoint a guardian for his child.

An examination of some of the provisions of the Registration Act also reveals certain anomalies and hardships likely to result from insistence on registration in such cases. Their Lordships grant that a document purporting to be a will but inoperative as such might nevertheless constitute a valid authority to adopt, if it has been duly registered. Can this concession be made effective under the Registration Act in the case of such a document executed by a minor ? If it is presented for registration *during his lifetime*, registration can be refused on the ground of his minority [S. 35 (3) (*b*)]. If it is however presented by his widow or the adopted son after his death, it may be registered (notwithstanding the minority of the executant) if the decision in *Arumugam Pillai* v. *Arunachalam Pillai* (17) is good law. This is certainly anomalous but to obtain the benefit of this anomalous rule, the executant *must die within four months* of the date of the document ; for though wills and authorities to adopt are for certain purposes put on the same footing in Ss. 40 and 41, the exemption from the time limit of four months is allowed by S. 23 only in respect of a will. On the *ratio decidendi* of the decision in *Arumugam Pillai* v. *Arunachalam Pillai* (17) a further difficulty may arise in this class of cases. As the executant was a minor, his widow and the adopted son will be minors too. Who then is to present the document for registration ? The Registration Act does not contemplate presentation by minors. *Arumugam Pillai* v. *Arunachalam Pillai* (17) proceeds on the footing that the provisions of S. 35 do not apply to a presentation under S. 40 ; it would then logically follow that S. 32 cannot apply too, so that the guardian of the minors who (by the definition in S. 2, cl. 10) can only present as a 'representa-

17. (1897) I L R 20 M 254.

tive' under S. 32 will have no *locus standi* to present the document under Ss. 40 and 41. In *Venkatappayya* v. *Venkata Ranga Rao* (18) this difficulty was sought to be got over by an appeal to *general principles* relating to the right and duties of a guardian; but it may well be maintained that if general principles of the Law of *Principal* and *Agent* are not available for the purposes of the Registration Law, other general principles should equally be excluded. It is noteworthy in this connection—whether the difference is intentional or not—that S. 42 (dealing with the *deposit* of wills) expressly mentions an agent, but not S. 40. In the course of the judgment under notice, the Judicial Committee observe, *in passing,* that it was not alleged in the case that the donee of the power either presented the documents herself or *gave authority for the registration.* These words could not fairly be construed as implying a *decision* that agency is permissible for purposes of S. 40. Assuming that a guardian may present the document for registration, difficulties may also arise as to the person competent so to act. After the decision in *Amba* alias *Padmavati* v. *Srinivas Kampthi* (3) it is doubtful if the natural father of the adopted boy has any *locus standi* in the matter. The legal guardian (the adoptive mother), being herself a minor, cannot act as a guardian—and her parents too must, according to the same judgment, have lost their right to act as her guardian after the marriage. Her father-in-law may perhaps be entitled to act as her guardian and, in his absence, the deadlock can only be obviated by invoking the aid of the Court to appoint a guardian—and even this must be done within the time allowed by the Registration Act for presentation. [See *Venkatappayya* v. *Venkata Ranga Rao* (16)].

It must be admitted that the hardships and anomalies above referred to are unavoidable in the case of a document which on the face of it purports to be nothing more than an authority to adopt; but there is no reason or justification for adding to the scope of such hardship or anomaly—especially when it is by no means clear why for purposes of registration the Legislature has thought fit to insist on this distinction between wills and authorities to adopt. It must also be remembered that when a document purports on the face of it to be a will, the conduct of the parties with reference to it is likely to have been influenced by the same assumption.

3. (1921) 26 C W N 369 (P C).
18. (1919) I L R 43 M 288 at 306 : 38 M L J 149.

A BILL

FURTHER TO AMEND THE LEGAL PRACTITIONERS ACT, 1879.

Whereas it is expedient further to amend the Legal Practitioners Act, 1879, for the purposes hereinafter appearing ; It is hereby enacted as follows :—

1. This Act may be called the Legal Practitioners (Amendment) Act, 192 . Short title.

2. For the definition of "tout" in S. 3 of the Legal Practitioners Act, 1879 (hereinafter referred to as the said Act), the following definition shall be substituted, namely :— Amendment of section 3, Act XVIII of 1879.

"'tout' means a person—

(*a*) who procures the employment in any legal business of any legal practitioner, in consideration of any remuneration moving from such practitioner or from any person interested in such business ; or who proposes to procure the employment in any legal business of any legal practitioner to such legal practitioner or to any person interested in such business, in consideration of any remuneration moving from either of them ; or

(*b*) who habitually frequents the precincts of Civil or Criminal Courts or revenue-offices or railway stations, landing stages, lodging places, or other places of public resort for the purposes of such procurement."

3. In S. 36 of the said Act,— Amendment of section 36, Act XVIII of 1879.

(*a*) in sub-section (1) after the word "satisfaction" the words "or to the satisfaction of any subordinate Court as provided in sub-section (2A)" shall be inserted ;

(*b*) to sub-section (1) the following *Explanation* shall be added, namely :—

"*Explanation.*—Evidence of general repute includes a resolution passed by a majority of not less than two-thirds of the members of an association of persons entitled to practise as legal practitioners in any Court or revenue-office, declaring that any person is or is not a tout" ;

(*c*) after sub-section (2) the following sub-section shall be inserted, namely :—

"(2A) A Court, Judge, Magistrate or officer empowered under sub-section (1) to frame and publish a list of touts may send to any Court subordinate to such authority a list of persons alleged or suspected to be touts ; the subordinate

Court shall thereupon hold an inquiry into the conduct of the persons mentioned in such list, and shall report whether any such person has been proved to its satisfaction to be a tout, to the authority by which the list was sent ; and that authority, where any such person is proved to the satisfaction of the subordinate Court to be a tout, shall include the name of such person in the list of touts framed and published by that authority."

(*d*) after sub-section (5) the following sub-section shall be inserted, namely :—

" (6) Any person whose name is included in any such list who acts as a tout shall be punished with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both. "

STATEMENT OF OBJECTS AND REASONS.

In their report the Bar Committee made the following observations in regard to touting :—

" We feel that our report would not be complete without some reference to an evil which was brought prominently to our notice in the course of our enquiry. The evidence which we have received leaves no doubt that touting of various kinds prevails in most parts of India. The law with reference to touting was strengthened in 1896, but has proved entirely ineffective. The plain fact is that unless the legal profession assists the Courts to suppress touts little can be done by way of legislation."

The Civil Justice Committee also referred to the fact that the employment of touts is the evident and immediate cause of many false claims and defences and of much waste of time in Courts.

The question of amending the law so as to permit of the effective suppression of touting was considered at length by the Government of India in consultation with the Local Governments and with judicial authorities immediately before the war, and it was only because of the war that legislation was not then undertaken. The Government of India consider that in view of the observations of the two Committees referred to above, in regard to the inefficiency of the present law and the evils attendant upon touting, legislation on the matter should no longer be delayed. The Civil Justice Committee have made definite recommendations for the amendment of the law

and these have been considered with the conclusions which had been arrived at by the Government of India in 1913 to 1915. The result of that consideration is embodied in the present Bill. Briefly, it is proposed to amend the law in the four following respects :—

(*i*) to extend the definition of a tout in S. 3 of the Legal Practitioners Act, 1879, so as to include firstly, persons whose remuneration comes from any person interested in any legal business as well as persons whose remuneration comes from the legal practitioner himself and secondly, persons who habitually frequent places of public resort for the purpose of procuring the employment in any legal business of any legal practitioner ;

(*ii*) to permit the receipt of a resolution passed by a majority of not less than two-thirds of the members of a Bar Association as evidence of general repute ;

(*iii*) to enable the Courts and authorities who may now frame and publish lists of touts to cause enquiries to be held by a subordinate Court, which enquiries, if the subordinate Court concludes that the persons in question have been proved to be touts, will lead to their inclusion in the list of touts framed and published under S. 36 of the Legal Practitioners Act ; and

(*iv*) to penalise any person whose name has been included in a list of touts who continues to act as a tout.

In regard to the last point it will be observed that under S. 36 of the Legal Practitioners Act the authorities are only empowered to exclude from the precincts of the Court persons named in the list of touts. With the extension of the definition of a tout to persons who frequent places of public resort other than Civil or Criminal Courts or revenue offices penal provision is required as was in fact recommended by the Civil Justice Committee.

The 21*st August*, 1925. A. P. MUDDIMAN.

In view of the importance of the question dealt with in the above bill, we make no apology for publishing the following communication [*Ed.*] :—

It may be easy to diagnose an evil, but it is another thing to devise a remedy to meet it. In no case is that more painfully evident than in the case of the attempt to stamp out the evil of touting. There is no winking at facts. Commission

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after Commission has detailed the evil. A quarter of an hour's visit to the corridors of the Presidency Small Cause Court at Madras, for instance, will be an eye-opener to any possible sceptic. The Bar Committee, while deprecating the evil and the unwholesome extent to which it exists, eating as a very cancer into the vitals of one of the noblest professions, is yet candid enough to confess that legislation cannot be any effective cure unless the legal profession itself makes a real move in the matter, They should advance beyond the stage of "Barkis is willing........" All the *bona fides* in the world and a wholesale lip condemnation of this evil by the Bar itself is not going to eradicate it unless the general sense of the Bar expressed in its corporate bodies like Bar Societies and Law Associations will induce those learned bodies to translate their sentiments into action by hauling up the delinquents.

Truths may be painful to hear, but facts are none the less true. It is a well-accepted principle of Economic Law that the supply will adjust itself to the demand. If there is no purchaser of contraband goods, smuggling will be at a discount. If there be no bribe-takers, there will be no bribe-givers. Equally, if there be nobody to encourage touts, and get engagements from them, this class of undesirables must meet with a natural death and become extinct without the intervention of Legislators or Courts. Overture ill becomes a Gown, be the wearer a member of the sterner or the fair sex. Hence, while advertising—and an amount of solicitation of custom—is condoned in several of even of the Learned Professions, we find the general etiquette of the Bar,—and Law has petrified the convention—is that there should be no solicitation on the part of the member thereof of briefs, though one is left to wonder whether it was always so, from the rather suggestive expression "solicitor" which smacks of such an act. Whatever may be the origin of the principle and however the legal practitioner might have been fed in the days of yore, and whatever vicissitudes might have happened to the lawyers, who from their being the honorary exponents of law, and honorary chivalrous champions of the weak, have become a class of persons willing to plead a cause or do technical work for a fee, this much is accepted on all hands that it is derogatory for a member of the profession to employ a broker to bring custom. Keen competition and a struggle for existence might have lowered the standard of morals ; or by temperament, all may

not come to live up to that high moral plane. For, if professional morals were so high, the existence of this army of touts, who have made their presence felt by the two Imperial Commissions, would be a riddle. Thus, it goes without saying that if anything effective is to be done in the matter of stamping out this noxious weed, that flourishes in the heart of one of the noblest of professions, the profession itself must gird up its loins and see that the stigma is removed for ever and its prestige safeguarded. It is a sad and lamentable exhibition of want of nerve on the part of the Bar Associations not to have by this time combined to eradicate the evil, root and branch, but let it flourish till the Legislature had to intervene and make it penal for a tout to persist in touting. Even till now, there was enough provision in the Legal Practitioners Act to punish the practitioner who will quietly stifle his conscience and sacrifice principle at the altar of Mammon. Ss. 13 and 22 of the Legal Practitioners Act make it unprofessional conduct for a legal practitioner to employ the service of a tout. In spite of this, we may pause and ask how many members have been so hauled up for professional misconduct? The absence of such a roll of persons, who have been booked, might mean only one of two things: either there are no touts and no touting, or that in spite of the penal clause, touting flourished and is not detected. It is certainly not the first alternative, though right glad will I be if I were wrong. But the fact is there and has received the recognition of a couple of Commissions. Touting exists. The result is that the other alternative is true, that is, the existence of a penal provision enabling Courts to punish legal practitioners who stoop to employ the touts did not suffice to detect the offence. Touting flourishes merrily by the Legal Practitioner paying a discount or commission or remuneration to the person who books a remunerative engagement for him. Till now, the person who gave that "bribe" was punished. That has not proved effective and it has to be seen whether the penalising of the taking of the bribe also is after all going to prove a more deterrent punishment.

In the first place it is no easy task to define exactly who a tout is. This class comprises gentlemen of a *variorum* kind, a class of non-descript individuals, who can be described as idlers attending Courts and as honest citizens of the land taking a pride in watching the Courts of Justice working, x-vakil gumasthas, dismissed Policemen, Law Agents, Brokers,

Scribes, Petition-writers, professional witnesses, and generally persons plying their trade in their own capacity as pseudo-philanthropists who profess to put inexperienced litigants in the way when they find themselves perplexed in the maze of litigation. How are you going to define this fraternity, as slippery as the eel, and pen them within the tight garters of a definition? They know enough of law to avoid its stings and they also know its pretty liberal loop-holes, as Legislature, true to tradition always includes some safety valves, vent ways and emergency exits in the construction of the edifice of an Act. They are further fairly educated persons, though men of the world and avoid its dangers and are not easily caught napping. Thus it is no easy affair to cast the net to catch all these professionals. It must be conceded that the soul of a definition of a tout must be his act of procuration of the services of a legal practitioner for a remuneration proceeding from either the client or the pleader. When the pleader is made an abettor of the offence, and finds the Damocles sword of a charge of professional misconduct hanging over his head, it will be very difficult to produce any proof of remuneration proceeding from that quarter. The penal provisions will rarely be brought into operation on account of the great difficulty, if not the practical impossibility of getting adequate proof. Human nature being what it is, we may presume that all men are not Samaritans and are not likely to make a hobby of supplying briefs to legal practitioners. Therefore, the definition of touts may be amended to the effect that the habitual procuration of briefs may be touting.

The Civil Justice Committee, consisting of an able body of Lawyers and Judges, have touched this fact also. Of course, they have generally indicated the directions in which legislation might proceed to strengthen the hands of the Court to combat the evil successfully. But it remains to be seen what practical measures are to be adopted and how far they are going to achieve the object in view. Generally it may be noted that Bar Associations should be given a legal recognition to act as a quasi-judicial body in the matter of initiating proceedings and prosecuting them. And Subordinate Courts, especially, where this undesirable system should obviously be expected to flourish, should be given adequate powers to deal with it.

But the main remedy for this evil should proceed from the Bar itself. Unless the general moral tone of the profession asserts itself, and refuses to tolerate the aberrations of

individual members thereof, and the Bar as a whole exhibits that stern sense of duty for the good and reputation of the profession as a whole, without exhibiting that squeamishness, forbearance and neutrality, worthy of a better purpose, and relentlessly hauls up a tout, with the concomitant necessity to expose, and if need be, punish his "Patron," I am afraid this system cannot be easily rooted out.

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SUMMARY OF ENGLISH CASES.

BORLEY *v.* OCKENDEN, (1925) 2 K. B. 325.

Workmen's compensation—"Arising out of and in the course of employment"—Taking work home contrary to orders—Accident at home while doing work—Compensation—Right to.

A boy employed in a boot-making business took home contrary to the orders of the authorities a pair of boots for the purpose of repairing them and thus improve his own skill. While doing the repairs at home, he injured an eye with an awl, and it had to be removed. He claimed compensation from his employers. *Held,* the injury did not arise "out of and in the course of employment" within the meaning of the Act and he was not entitled to recover compensation.

WARREN *v.* WARREN, (1925) P. 107.

Divorce—Adultery—Confession of wife—If admissible in evidence.

In a petition for divorce by a husband, a confession by the wife that she had committed adultery and that the child born was the result of the same is admissible. *Russel* v. *Russel,* (1924) A. C. 687, only excludes evidence of either spouse as to non-access which would bastardize the issue, and a belief by the wife that the child born is the result of adultery does not rebut the legal presumption of paternity in the husband, in the absence of proof of non-access.

In re HACK : BEADMAN *v.* BEADMAN, (1925) 1 Ch. 633.

Will—Construction—Devise of copyhold—Heir-at-Law—Rule in Shelley's case—Applicability.

In the absence of a special custom of descent in a manor, copyholds are governed by the ordinary law of descent and a devise of a copyhold estate "to *X* and after his death to his heir-at-law" does not exclude the rule in Shelley's case. *X* would in such a case be entitled in customary fee simple for an estate to him and his heirs according to the custom of the manor.

In re FIELD : SANDERSON *v.* YOUNG, (1925) 1 Ch. 636.

Will—Construction—Trustee to pay rent and perform covenants to repair—Equitable tenant for life—Receipt of rents after death of trustee—Liability to repair—Acceptance of benefit—Effect of.

In exercise of the power conferred by a will, *X* appointed trustees to take possession of certain leasehold estates, pay the rent fixed and after doing the repairs contained in the covenants in the lease, pay over the balance to *Y* or permit *Y* to receive the rents. After the death of *Y* the properties were to be held in trust for the daughters of *Y*. Even during the life-time of *Y* the last of the surviving trustees died and as his legal personal representatives refused to have anything to do with the trust, *Y* began to receive the rents herself. She, however, failed to keep the leasehold estate in repair, contrary to the covenants in the lease. After the death of *Y*, her daughters who were the ultimate beneficiaries sued the personal representatives of *Y* for damages for breach of the covenant to repair. *Held*, the principle that a person can only take a benefit *cum onere* applied and *Y* having full knowledge of the primary trusts affecting the estate was bound to perform the same. Performance of the covenant to repair being a condition precedent to obtaining the benefit of the rent, her estate was liable. (1924) 1 K. B. 826 ; 54 L T. 105 referred to.

In re DAVIES : SCOURFIELD *v.* DAVIES, (1925) 1 Ch. 642.

Will—Construction—Specific gift of proceeds of sale—Contrary intention—Wills Act, 1837, *S.* 24.

A testator by his will made a devise in favour of his wife of certain properties, impleading among other things "moneys representing the proceeds of sale of such parts of the said estate as have been sold". Between the date of the will and his death, certain contracts for sale were entered into by him, some of which were completed by him and others by his execu-

tors. The question arose whether proceeds of the sale realised after the date of the will passed to her. *Held,* the true principle to apply is that if a testator bequeaths property which is capable of increase or decrease and describing such property by a generic term, such as "proceeds of sale" he must be taken to have known that with reference to that property his will would be read as if it had been executed immediately before his death. The mere use of the past tense does not amount to a "contrary intention" within the meaning of S. 24, Wills Act.

In re NORTHCLIFFE : ARNHOLZ *v.* HUDSON, (1925) 1 Ch. 651.

Will—Covenant to settle after-acquired estates—Confirmation by codicil—Effect of—Republication.

A clause in a settlement deed contained a covenant to the effect that any freehold estate purchased by the settlor thereafter would be subject to the terms of the settlement. He subsequently acquired freehold estates and by a will executed subsequently confirmed the settlement, and later after acquiring some other freeholds executed codicils in each of which the will was confirmed. *Held,* by confirming the will in the two codicils, the effect was to republish the will and the freeholds formed part of the settlement.

THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS, LTD. *v.* MOTOR MANUFACTURERS AND TRADERS MUTUAL INSURANCE CO., LTD., (1925) 1 Ch. 675.

Trade name—Similarity of name—Injunction restraining use of—Risk of confusion.

A Society having for its object the promotion and encouragement of the motor trade generally, was registered in the name of "The Society of Motor Manufacturers and Traders, Ltd." Some years later, a Company whose business was to effect insurance against risks connected with motor vehicles was incorporated under the name of "Motor Manufacturers' and Traders' Mutual Insurance Company, Ltd." The older Company sued for an injunction restraining the other from carrying on its business under any name containing the words "Motor Manufacturers and Traders". There was no evidence to show fraud or tangible risk owing to similarity of names. *Held,* the plaintiffs were not entitled to the relief claimed against the defendants.

Per Lawrence, J. (and affirmed by the Court of Appeal)—The question must be decided by an appeal to the eye and ear coupled with a proper consideration of the surrounding circumstances and the evidence of persons coming in contact with the plaintiff Society's name. It is well established that a Court of Equity will protect business reputation enjoyed by a person against tangible risk or probability of injury; but where there is no fraud and a Company has adopted a purely descriptive name, the onus of proving that another Company by adopting a somewhat similar descriptive name is exposing the credit or business reputation of the other is a very heavy one.

REX *v.* BATEMAN, 94 L. J. K. B. 791.

Criminal Law—Medical practitioner—Manslaughter—Negligence—Test of liability—Standard of skill and care.

If a medical practitioner holds himself out as possessing special skill and knowledge and he is consulted on behalf of or by a patient, he owes a duty to him to use due caution, diligence, care, knowledge and skill in undertaking the treatment. No contractual relation is necessary, nor need the service be for reward. The law requires a fair and reasonable standard of care and competence. If death is caused by indolence or arelessness, it will not avail to show that the medical practitioner had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by gross ignorance and unskilfulness. Where incompetence is alleged he cannot claim to be measured by any lower standard than what is applied to a qualified man. To support an indictment for manslaughter the jury must be satisfied in addition that the negligence or incompetence went beyond a mere matter of compensation and showed such utter disregard of the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

In trials for manslaughter by negligence, it should be impressed on the jury that the issue is not negligence or no negligence, but felony or no felony.

GLICKSMAN *v.* LANCASHIRE AND GENERAL ASSURANCE Co., 94 L J K B 797.

Insurance—Burglary—Policy invalid in cases of concealment and untrue statements—Concealment of subject-matter—Materiality of—Burden of proof.

A policy of burglary insurance was issued on the express condition that it would be void if obtained by any misrepresentation, concealment or untrue averment of facts. One of the questions which the proposer had to answer was if any company had declined to effect or renew the burglary insurance. To this an answer substantially untrue was given. *Held*, the omission to inform the insurer of the true state of things was a concealment which rendered the policy void. In such cases the burden of proving absence of concealment is on the person who claims under the policy.

THE CHEKIANG, 94 L J P D & A 51.

Shipping—Collision—Measure of damages—Principles applicable—Non-profit earning vessel.

The damages recoverable from a wrong-doer in cases of collision at sea must be measured according to the ordinary principles of the common law. Where a shipowner claims damages against a single tortfeasor for damage done to his vessel by the negligence of the tortfeasor, the considerations that should guide the Court are the same as if a collision had taken place on land between vehicles belonging to the same class of owners. In both instances the plaintiff must prove his case and must, within the accepted rules, establish the claim for damages which he sets up.

The fact that the vessel damaged is a non-profit earning vessel is no reason why damage should not be awarded to the owner as against a tortfeasor.

JOTTINGS AND CUTTINGS

Lord Carson—In the *Daily Telegraph* of the 3rd inst., Sir James O'Connor, late a Lord Justice of Appeal in Ireland, gives an interesting impression of that figure predominant in the present generation of lawyers, Lord Carson. "He has great qualities that made him possibly the first advocate at the English Bar...... A knowledge of human nature, an instinct in the detection of falsehood and a tenacity in following up a clue made him a master in the art of cross-examination. . . He has a real sense of proportion, a priceless quality, indispensable to legal success. His arguments were logical, well-balanced, never lop-sided." We may recall that Lord Carson dissented, in company with Lord Sumner, from the startling judgment of the House of Lords, last year, in the case which is at once a *cause celebre* and a leading authority : *Russell v.*

Russell. Thereby, as many think, he showed a continuance of those last-mentioned faculties which, as Sir James observes, he displayed as advocate. Later it is said : " In the Arthur Balfour days he was depicted in *United Ireland* as a ghoul. The influence of this was upon me when, as a boy, I saw him in Wexford Court-house prosecuting Edward Welsh, of the *Wexford People.* He was to my mind all that is evil and forbidding; but in truth there is nothing sinister in his appearance at all. He has a keen, hatchet-like face, which lends itself to caricature, as strong faces do." Whatever of sympathy or antipathy Sir James' observations on the political aspects of his subject may arouse, no reader will contend that the foregoing is not well-observed. If it is not inept to comment upon a man's face while he is still living, we may venture the remark that Lord Carson's has always been profoundly interesting. It is difficult to say which most intrigues those who regard it, the outstanding strength of it or the underlying kindness ?

—*The Law Journal,* September 12, 1925, p. 785.

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Sea Bathing.—With reference to the article on " Sea Bathing " in a previous issue (p. 749), a correspondent calls attention to S. 193 of the Law of Property Act, 1925, and gives his confident opinion that, when it comes into force on January 1, 1926, it will sweep away the majority decision in *Blundell* v. *Catterall* (1821, 5 B. & Ald. 268), together with *Brinckman* v. *Matley* (1904, 2 Ch. 313), and all other cases in denial of a public right of bathing off the foreshore. The section in question gives the public " rights of access for air or exercise " to common land or " manorial waste." If, then, the foreshore is manorial waste, any member of the public can proceed thither, divest himself or herself of superfluous clothes the better to enjoy the right of air (subject always to the overriding laws of decency), and, having so proceeded, walk into the sea in pursuance of the right of exercise. The chain is therefore complete, subject to the question whether the foreshore is " manorial waste." As to this, reference may be made to *Attorney-General* v. *Hammer* (1858, 27 L. J., Ch. 837). In his judgment in that case Baron Watson said (p. 840) : " The word ' waste ' means desolate or uncultivated ground, land unoccupied, or that lies in common. This is the plain and common acceptation of the word, and undoubtedly land between high and low watermarks falls within this signi-

fication. . . again, in the description of land or manors, the terms 'lord's waste' or 'waste of the manors' are well known. The true meaning of 'waste,' or 'waste lands," or 'waste grounds of the manor,' is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor, other than the demesne lands of the manor." The Crown, as lord of a manor, having granted coal-mines within the waste grounds of the lordship, he therefore concluded that mines below the foreshore passed under the grant. The case is authority, if authority be needed, that the foreshore up to the high-water-mark is waste land.

—*The Law Journal*, September 12, 1925, p. 786.

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The Philosophy of Law and the Ex-Solicitor General.—*En passant*, by the way, we notice that Sir Henry Slesser figures prominently in the Council of the new Institute of Philosophical Studies, recently founded under the auspices of the Master of Balliol, to promote the serious study of philosophy in England. We see that the Institute intimates its intention of including the philosophy of politics and the philosophy of law amongst the branches of metaphysics that it is concerned in promoting. We fancy that in this we see the hand of Lord Haldane and of Sir Henry Slesser, both of whom have given to the world serious treatises on metaphysics. Lord Haldane has produced "The Pathway of Reality," and two works on the Theory of Relativity, but from the standpoint of Platonism or rather of Hegelian Idealism, whereas Sir Henry Slesser's "Essay on Ontology," published a decade or thereabouts ago, belongs rather to the Neo-Scholastic and Neo-Aristotelian School of realists. The Philosophy of Law, by the way, is a subject which lawyers, academic as well as practical, have too much neglected in this country. The only recent work on the subject, so far as we know, produced by any English teacher of law, is Professor Montmorency's short essay on the "Natural History of Law," published two or three years ago by the Oxford Clarendon Press.

—*The Law Journal*, October 3, 1925, p. 827.

BOOK REVIEWS

PLEADINGS IN INDIA WITH PRECEDENTS, by Walsh and Weir. Ram Narain Lal, Allahabad. Price Rs. 5.

This small book on the drafting of pleadings in India giving precedents written by Mr. Justice Walsh of the Allahabad High Court and by Dr. Weir, Professor of Law

in the Allahabad University, with an introduction by Sir Grimwood Mears, Chief Justice of the Allahabad High Court, is bound to arrest the attention of the legal profession in this country. The necessity of a book on this subject has long been felt and an authoritative exposition of the principles of pleadings with precedents by the distinguished authors is bound to be of great value. The book is modelled in some measure on the well-known treatise of "Bullen and Leake," although it is not so exhaustive and the references to cases are not so full. The book is written in the lucid style of Mr. Justice Walsh with which we are so familiar and which is exceedingly pleasant reading ; and we would recommend a study of the book by all lawyers and even non-lawyers interested in the subject.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, by M. Krishnamachariar, M. A., M. L., PH. D. P. R. Rama Aiyar and Company. Price Rs. 4-8-0.

We welcome the publication of the commentaries on the Madras Hindu Religious Endowments Act (I of 1925) by Dr. M. Krishnamachariar with an introduction on the subject. This highly controversial piece of legislation has attracted very much attention both of lawyers and laymen. Indeed its validity is being tested in the Courts of Law. This commentary on the Act by Dr. Krishnamachariar with whom we are already acquainted as a legal writer of note will, we are sure, be found of great use in the thorough understanding and working of the Act. The learned writer has given references to the English and Indian decisions in appropriate places. Appendix A gives the statement of objects and reasons, the report of the Select Committee, and the message of the Governor remitting the Bill. Appendix B gives the Religious Endowments Act of 1863 and other connected measures.

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LAW REPORTS*

V.—English Reports.

Dr. Bigelow's Placita Anglo-Normanica gives us the earliest cases decided after the Norman Conquest. It takes us back to the time of William the Conqueror. Another publication known as Rotuli Curiae Regis gives extracts from Court records of cases decided between 1194—1199. We have not got Court records for any earlier period. One explanation given for this is that when legal memory was declared not to extend beyond the first year of Richard I, the earlier records ceased to have value and were neglected. Of course, an equally plausible suggestion is that no records were maintained before that date and therefore that date was fixed as the starting point for legal memory. The records of those early times frequently contain the Judges' reasons for their judgment, but the practice ceased some time afterwards. Accounts of some cases (and sometimes in great detail too) are given by old monkish historians and some cases are found elsewhere also. It is from sources like these that the early cases reported in the State trials are extracted. So also Jenkins gives us some early cases in his Centuries. He was a Welsh Judge and a contemporary of Coke. He compiled them during the period of enforced leisure while in jail under the orders of the Long Parliament. It consists in the main of abstracts from the Abridgments of Fitz Herbert, Statham and Brook, from the Year-Books, from certain other reports down to Coke and also from certain unpublished manuscripts. The work is arranged in books, each consisting of a hundred cases and was hence called Centuries. Bracton in his treatise cites not less than thousand cases of his own time and prior. It appears he had also a note book of cases from 1238 up to his

*The fifth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court,

time compiled from the records of the Court. It is idle to call all these reports. In later times when the value of precedents came to be recognised, and reports became a regular institution, people came to have an exaggerated notion of the importance of reports and fancied that they must have been ever present. There are more tangible references, however, to the reports of the time of Edward I, in the writings of Hale. In the Year Books a portion of the first volume deals with Edward I's reign, but it consists of mere extracts from the records of the Exchequer. The practice of reporting seems to have begun some time during that reign. The Year Books are the result.

They cover the long period from 1307 to 1537 with some occasional gaps. As I said before, out of these for the period of Edward I we have no regular report. Even, when they commence, they are far from being like the reports of to-day. They are something like a newspaper report—an exact transcript of what took place in the Court, of the statements of Counsel, the observation of Judges whether strictly relevant to the case or not, and even the observations of the members of the bar present. Occasionally Judges read a lecture in the course of the arguments for the benefit of the apprentices and that too is recorded. The moods of the Judges are noted. Interspersed, one finds also the views of the reporter as to the merits of the performance of the Judges and the practitioners concerned. Sometimes the report of a case ends with the arguments of the counsel and sometimes it ends with a day's proceedings. In some cases judgments, it is stated, would follow, but they never follow, either because the reporter was not present when the judgment was delivered and he had no access to the rolls of the Court from which he could give the judgment or because no judgment was delivered or because he did not care how the judgment went. The earliest of these reports give no dates, nor do they arrange matter chronologically. Rather they distribute matter under suitable heads after the manner of the later printed abridgments. Even when chronological order came to be adopted (it is this that gives them their distinctive name) the writers are not particular about assigning dates. Sometimes names of the parties are not given. Sometimes they are wrongly given. As years went on reporting became a regular pursuit and also became more efficient. For instance, the Book of Assizes, one of the Year Books, reports in a style

very different from that of the other Year Books of Edward III's reign. That is to say, it is more concise and generally gives a gist of the argument and the decision rather than the actual report of the proceedings. The Longo Quinto seems to be even a more elaborate effort. Naturally, the reporters became more skilled as time went on. It was this skill that made later writers like Plowden and Coke to fancy that these reporters were official reporters.This view has now been demonstrated to be wrong. They were unofficial reporters—in the beginning possibly mere students or apprentices, but, as time went on, from a student's note-book, it grew into a regular report. The personal details become fewer and the report of the case becomes the main thing. Naturally, with the more frequent citation of cases, the need for reports became more pressing and the supply also became proportionately more efficient. From the Year Books we see that the Judges and the Sergeants belong to the same order. The Court asks for their opinion. The reporter records their dissent or disapproval. Oftentimes, their opinion is regarded with more consideration by the reporter than the dicta of the Judges. It was the period of professional development of the Common Law, the nearest approximation, in fact, in English Law, to the growth of the law by *responsa prudentum*, we have under the Roman system.

The reason why so often only pleadings and discussions are given and not the judgment is that at that point of English legal history the rules of pleadings and the issue of processes were much more important than rules of substantive law. So far as law was concerned there was little or no dispute. If a man had his proper legal formula, called writ, his remedy followed as a matter of course. If he had not his legal formula, or if his facts did not square with the formula equally clearly, he failed. The proper formula was therefore the first essential. The proper statement of the case was the next essential. If, as we have shown in the last lecture, there was any trouble of duplicity or inconsistency in the pleading, the action failed. It was the duty of the practitioner to avoid these pitfalls. Hence, in an action, what interested a practitioner was that portion of the proceedings in which the pleadings were discussed. In the beginning there was no examination of witnesses; all questions of fact were left to the jury who had to decide the case on their personal knowledge. So that the question of venue or the locality from which the jury had to be summoned was very material and discussion

about it figures naturally very largely in the Year Books. These Year Books are in French. French became the Court language in William the Conqueror's time and continued so till the time of Edward III who ordered that "all pleas should be pleaded, shown, defended, answered, debated and judged in the English language but entered and enrolled in Latin (36 Ed. III, c. 15). Latin continued in use until the time of Oliver Cromwell when English took its place. On Restoration Latin was restored to its old place and continued to occupy that position until the passing of 4 George II, c. 26 which directed that all proceedings should be in English. These Year Books are considered to possess very high authenticity though there are indications in them that the reporters did not understand sometimes what the Judges were saying. Indistinctness is not the monopoly of the Judges at present ; they were indistinct at times also then. The reports are, also, at times very confusing. There is little to indicate what words are of the Bench and what of the bar. All parties seem to be constantly interrupting each other in the most disputatious style and the reader is puzzled to say who is the Judge and who is the counsel.

The cases reported in these series are mostly from the Common Bench as the Common Pleas used to be called then. The work of the Sergeants lay mostly in that Court and the reporters also confined their attention mainly to that Court. The earliest of the Year Books extant date from 1292 and continue up to 1307. These are recent publications from original manuscripts. The next of the series cover the period 1307-1328. These are called Maynard's Edward I and II because they did not form part of the editions of the Year Books prior to 1678 but were published in that year for the first time by Sir John Maynard, a distinguished lawyer of the day, from ancient manuscripts. The volume dealing with the period 1328 to 1338 is cited as the first part of Edward III. It contains a continuous and well-reported series. After 1338 there is a gap for seven years till we come to the next volume. There are manuscript Year Books of these years still unpublished. The next volume cited as second part of Edward III relates to the period between 1344 and 1367. The next two parts are cited as the third of Edward III and are also known as Quadragesm. The next part of the reign of Edward III is cited as Liber Assizarum or the Book of Assize. It contains cases through every year of the reign and is referred to by Coke as a book of great authority. The last two parts of

Edward III were preferred by old lawyers to the earlier parts. The reports here are more clear and concise and occasionally one stumbles upon a case that turns on points of law that interest even a modern lawyer. But for the most part they are filled with interminable wrangles about the forms and pleadings of real actions, matters naturally of the highest interest to the mediæval lawyer though happily of no interest to the modern. In the Quadragesm there is recorded a witty saying of Cavendish, a Chief Justice of Edward III's time, to which reference may be made. A question having arisen about a lady's age whether she was within age or not, the counsel pressed the Judge to have her before him so that by inspection he might be satisfied as to her age. The Judge is said to have remarked that " there is no man in England who can rightly tell if a woman has reached majority or not, for some women who are of thirty years of age wish to appear but seventeen ". There is no published Year Book of Richard II, the so-called Year Book of his time being Bellew's cases Temp. Richard II which is but an abridgment of a true Year Book. There seems to be such a genuine manuscript Year Book in the British Museum. It has not yet been published. The Year Book of Henry VI is complete so far as years go but incomplete as regards terms no less than 20 out of 44 terms being unrepresented. The reports for the first year are very meagre but for subsequent years they are fuller. It is in this series that the case of " Rival Grammar Schools " which is cited to illustrate the rule of *Damnum Absque Injuria* is reported. In the Year Book of Henry V the first case pronouncing against agreements in restraint of trade is reported. These reports are not so highly regarded as the reports of the last 12 years of Edward III. The Year Book of Henry VI is in two parts, the second part being considered particularly valuable. Along with the last part of the Year Book of Edward III, the Books of Assizes of Edward IV and Henry VIII this Year Book was specially recommended by Sir Mathew Hale to the young student. That was about the time of Maynard, the lawyer who refreshed himself after the fatigues of a long journey with a volume of these reports. The Year Book of Edward IV is in two parts, the second being called Longo Quinto because it is confined to cases heard in the fifth year. Both parts, particularly the last, is said to be full of excellent, that is for us, curious, learning. In these several terms are omitted though no whole year is omitted.

The next volume of the Year Book deals with the period 1484-1537. The Year Book of Richard III records a conferring in person of the King with the Judges. The Judges answer the King's questions with intelligence and candour but at the same time firmly say that they alone have the right to render legal judgment on the questions raised and not the King. In the Year Books of Henry VII the Judges and counsel are found citing cases as well as text-books like Bracton. The Year Books of Henry VII seem to be inferior to the earlier Year Books.

There are constant references in these Year Books to the abridgments and *vice versa*. In some cases where the Year Books do not give the judgments but only the arguments the abridgments give the judgments. To one of the early Year Books a Calendarium or extracts from the rools is attached. In these Year Books you find not only a groping for the correct method of expressing the law but also for the right method of distributing the matter. It took a long time before it was finally settled that the pleadings, facts, arguments and judgments must appear in the same place. Various experiments were tried, of giving pleas in one place, facts and arguments in another—judgments in a third before the present plan was finally adopted. Though the lawyers of the 17th century commended these books to students, they became gradually forgotten and as early as 1809 Lord Mansfield is reported to have observed when a case from 7 Edward III was cited, that it was a great way to go back for a precedent. Though the march of time has thrown most of the Year Books into the limbo of forgotten things and none but antiquarians and scholars seeking for the beginning of legal ideas are likely to go to them, we find them occasionally cited even now. As late as (1921) A. C. 590 we find a reference made to Year Books. [*See* also (1911) 2 K. B. 843]. To the student of the history of the law, these Year Books are a mine of information. They show the law in the making, though the complicated procedure of the time make them somewhat difficult of comprehension. They show how at one time, the forms of action were all in all, how in the absence of a form of action, there was no remedy at law, how the Chancery Courts used to issue writs to remedy these defects, how and when the parol contracts came to be enforced, and when the epoch-making writ of assumpist was introduced. One very remarkable feature that is noticeable in these reports

is the long, laborious and subtle arguments that are addressed. Cases used to be argued several times and judgments were sometimes not delivered for years on end. This state of affairs continued till the time of Lord Mansfield who put an end to those lengthy hearings and introduced the practice of delivering judgments immediately the arguments were over.

Benloe and Dalison's Reports of the Common Pleas cover the period 1486-1580, thus overlapping the period of the Year Books. Dalison was Chief Justice of the King's Bench during the reign of Mary. It may be said of his and some other reports of the time that they contain not only the cases reported by the people whose names they bear but also those taken by those that went before them and also additions made subsequently by others. It comes from the fact that they are lawyer's note-books, possibly not intended for publication, and in fact published long after the death of the reporter. These reports merely give a short statement of the facts and the point decided. Keilwey's Report of the K. B. and C. P. cover the period between 1496-1531. These record many decisions found also in the other reports and some more in addition. Mosses's, K. B., Ex. and Ch. Reports are also regarded as authorities. They cover the period from 1512 to 1621. In the midst of prosaic narration of points and decisions, we find there, a real romance of two lovers resolving upon suicide but one of them the woman finally receding. The question was as to whether she was guilty of murder. Many learned arguments were addressed but the final conclusion is not stated.

Dyer's Reports are the notes of Chief Justice Dyer of the Common Pleas, sometimes also Judge of the Queen's Bench. They are not as full as later reports but resemble more the concise notes of a man of business, containing an accurate statement of the case, with the objections and answers in as short a compass as possible. This is the first book to be called reports. The previous reports were called annals, commentaries or cases. Brooke, the author of a well-known abridgment, is also responsible for a report known as Brooke's new cases, (1515-1558). Anderson, whose reports cover the period from 1534-1604, was the Chief Justice of the Common Pleas and an ardent supporter of the Protestant religion. Though not famed for toleration, he was a fearless supporter of the dignity of his office and opposed the pretensions of Elizabeth to interfere with the Judges. Leonard's reports have been

commended by such great authorities as Sugden and Nottingham. Plowden's Reports (1550-1580) are among the best reports of any time. He thoroughly understood his duty as a reporter. Before a case came to be argued he used to have copies made of the record and took pains to study the points of law arising. He attended the arguments. He gives them always following the course of reasoning precisely, with the precedents quoted, in the style of a formal debate. He gives the judgment of each of the Judges separately with the reasons given. To ensure accuracy he used to submit his reports to the Judges and the Sergeants concerned in each case. The reports are very authoritative and have drawn great encomiums from Judges and scholars. They are cited even to this day. They are one of the few old reports published during the author's lifetime. Plowden was not, unlike most of the other reporters, a Chief Justice or even a Judge. Being a Roman Catholic, he was denied the privilege of becoming one. Noy,who was the Attorney-General of Charles I, has also a report to his credit. They are a loose collection of notes not all made by Noy himself with no statement of facts and no arguments. Justice Bueler said of this report that it has always been considered as a bad authority and Lord Thurlow concurred with him (3 Term Rep. 424). The book is not an imposture but seems to be an abridgment of Noy's note-book by one of his students. Carlyle has many hard words to say of this lawyer.

Brownlow and Goldsborough were Prothonotaries of the Common Pleas and report mostly practice cases. Some of the cases reported here are found in Yelverton verbatim—probably they were copied from the latter. Next we come to Coke whose reports are called the reports—*i. e.*, reports *par excellence.* The reporting cannot be claimed to be in any sense ideal. In this respect Coke contrasts very unfavourably with Plowden. He first gives a statement of facts and then what was moved, then the substance of what was said on both sides and, finally, the report is wound up with the resolutions of the Court. There is very little arrangement. In stating the arguments case is followed up by case, quotation leads into quotation, illustration opens into illustration and successive inference is made the premise for a new conclusion. The whole thing is a labyrinth of conclusions, exceptions, parantheses and so forth. The array is no doubt very imposing but the arguments and conclusions are far from being clear, The first eleven volumes were published

during the lifetime of Coke and are of the very highest authority, his own authority being as great and even much greater than that of Judges whose judgments he reports. The 12th and 13th volumes appeared after his death and are more or less apocryphal. There was much criticism of Coke as to his having given as Judge's opinions, his own opinions or as having misreported cases. But with all that, we have the testimony of Lord Bacon himself who was his enemy that but for his labour, "law by this time had been almost like a ship without a ballast." Coke was Attorney-General, then Chief Justice of the Common Pleas and finally Chief Justice of the King's Bench. Coke's reports are in French.

Croke's Reports (1582-1641) by Croke, Judge successively of the Common Pleas and the King's Bench and Yelverton's Reports (1603-1613) by Yelverton, a Justice of the King's Bench, command great authority. Even where the rolls do not support them, their authority has been upheld in preference to the record as such omissions are not rare and Justices Coke and Yelverton were men of integrity and could not be believed to have made any statement without verifying it. Lord Hobart, who succeeded Lord Coke as Chief Justice of the Common Pleas, is the author of a set of reports dealing with the period 1603 to 1625 and giving also some cases of Elizabeth's time in addition. They were published after his death by a careless editor but was subsequently corrected by Lord Nottingham. They contain marginal annotations by Lord Hobart himself. Though somewhat defective in method, they are admitted to be a standard work of their day. Lord Hobart is remembered mostly for his reputed observation about the distinction between Common Law and Statute Law, "that the Statute is like a tyrant; where he comes, he makes all void; but the Common Law is like a nursing father and makes void only that part where the fault is and leaves the rest." Ley, Chief Justice of the King's Bench in 1621, reports cases of King's Bench, Common Pleas, Court of Wards and Star Chamber of the years 1608 to 1629. Unlike most of the other reports hitherto referred to, it has the appearance of a report in that it gives an orderly statement of facts, the question which arose and finally the adjudication by the Court. The Court of Wards was established in 1542 to take care of infants and adults and after a career of mismanagement was abolished in the time of Charles II.

V.

Rolle, sometime Judge, is the author of a report as well as of an abridgment which also may well be reckoned as a report as it reports many cases not elsewhere reported. He is spoken of very highly by Sir Mathew Hale in the preface written by him to Rolle's abridgment. Sir H. Calthorp was a Recorder of London and the reports that bear his name have had a certificate from Sir John Burrow, that they are prettily reported and elaborate. Bulstrode is another reporter whose reputation is not high and in fact in one case, his reporting was found inaccurate on comparison with the rolls. Hutton was a Justice of the Common Pleas and his reports purport to be reports of causes heard by himself and copied by his own hand. The printed volume seems to be a selection of cases from Hutton's note-book. Palmer's Reports deal with cases from 1619 to 1629. He became an Attorney-General. Some of the cases reported by him must have been copied from others. A Chief Justice of Ireland and then successively a Judge of the Common Pleas and of the King's Bench, Sir William Jones is the author of Reports, cited as 1st of Jones, a work of authority. Judge Winche's Reports (1621-1625) have been commended by Lord Kenyon as reporting cases well, but the authorship is wrongly ascribed to the Judge, It is a translation from a French original by an unknown author. Latch has been considered as among the least accurate of all the reporters. Littleton's Reports (1626-1632) deal with prohibitions. It claims, unlike some of our modern publications, which claim not to have omitted any cases reported elsewhere, to have left out all cases elsewhere reported but like all such proclamations, wrongly. Lord Campbell thought it was not very valuable. Littleton was Chief Justice of the Common Pleas. He was a little liberal in his ideas where pagans were concerned. Whereas Justice Brooke, the author of the well-known abridgment of Henry VIII's time, treated a pagan as on a level with an outlaw and rebel and considerably below a dog and thought that if a Christian beat a heathen the latter can have no action and Sir Francis Moore styles a Turk a "*hostis communis* to all Christians" and Lord Coke commends Justice Brooke's dictum adding that "all infidels are in law perpetual enemies for, between them as with the devils whose subjects they be, and the Christians, is perpetual hostility and can be no peace." Littleton delivered himself of the humane sentiment that though "there be a difference between the religion of infidel natives and

ours that does not oblige us to be enemies of their persons ; that they are God's creatures and of the same kind as we are, and that it would be a sin to do bodily harm to them." It is a far cry from this to the modern doctrine that the State is not Christian at all, and a legacy even to subvert Christianity cannot be pronounced illegal on that ground. Hetley was under Lord Bacon's scheme appointed an Official Reporter but his reports (1627-1632) show no particular marks of skill, information or authenticity. Clayton's reports are reports of the Assizes and though not of much use practically may be read for the curiosity of the cases he reports. March (1639-1643), whose reports go under the name of March's New Cases, was pronounced by Chief Justice Parker (10 Mod. 138) to be an indifferent reporter but "is not to be rejected" according to another learned person. Star Chamber cases give us an idea of the doings of the Star Chamber during its existence. So far the reports were mostly in French and the records in Latin. Cromwell's Government prohibited the use of foreign tongues in Courts. As a result English reports appeared. Style's reports deal with the period and are valuable as the only records of the judgments of Rolle and Glyn, the Chief Justices of Cromwell. The King's Bench was then called the Upper Bench. They were published by the author himself. Aleyn is another reporter of the period. In Aleyn, the case of *Paradine* v. *Jane* is reported where it is laid down that accident or inevitable necessity does not exonerate a man from liability which he has undertaken. The cases in this report find a place in Viner's abridgment without any dissent or disapproval. The report of *Manby* v. *Scott,* one of the leading cases in Smith's Leading Cases, is taken from Siderfin's reports. Siderfin has been valued differently by different people, Holt's opinion being against him. It was published after his death and like all old reports, some cases are not intelligible and some are wrongly reported. Making allowances for such errors, the report seems to be fairly good. Hardres reported Exchequer cases, the judgments being of Sir Mathew Hale. The arguments are given at much greater length than Judgments. He argued many if not most of the cases reported by him.The report is of authirity.

Most of the reports to which we have been referring were posthumous publications. Some of the reports like Moore Dyer, Croke, Rolle, Yelverton, Anderson Jones, Leonard and Godbolt were edited by responsible persons who had manuscripts

in their possession. But in the case of Noy, Popham, Winch, Littleton, March, Hutton, Lane, Hetley, there is no account of the manuscripts and not even the name of the editor was given. They are mostly lawyer's note books into which he would copy whatever of the early cases he got and add those of his own. Further additions would be made by people into whose hands the notes fell, with all the errors the process would involve. Add to it, the errors in transcription which must have been great and the wonder is that they are even as good as they are. Some of these reports were published as mere printer's speculations; sometimes with a lawyer's certificate as in the case of 12 Coke, which was published with a certificate from Bulstrode who had afterwards to explain away his certificate. They were most of them not designed for the press. Up to 1648, the only reports in print were certain of the Year Books, Plowden, Dyer, Keilwey Bellewe, Dalison, first parts of Coke, Davies, Hobart. After that came all the other reports which have been described by a contemporary as "flying squadrons of reports," In 1657, in an address to students, Grimston said referring to them " a multitude of flying reports have of late surreptitiously crept forth." These remarks were made with reference to Bridgman, Noy, Sevile, Lane, Ley, Hutton, Hetley and Aleyn.

All the reports we have hitherto referred to are Common Law reports. For the period we have dealt with we have hardly any reports in Chancery. That is a period when precedents had hardly come to be recognised in Chancery. But some idea of the progress of the equity law can be had from Chancery Calendars published by the command of George IV in pursuance of an address of the Commons. They are Calendars of Proceedings in Chancery in the time of Elizabeth to which are prefixed examples of earlier proceedings in that Court from the time of Richard II. They show that in early times, the Chancery Courts had much less to do with uses than is supposed, the main ground for their interference urged being that the defendant was powerful and that it was impossible to get justice in King's Courts. They also show that all the grounds of equity subsequently recognised were also recognised from the time of Henry VI though the practice was not systematised. The real credit of Nottingham and others is to have fixed the limits of equity jurisdiction and to have enunciated clearly the principles. Acta Cancellarii is a recent publication giving extracts from the Court

records from 1545 to the end of the reign of Queen Elizabeth. Cary's reports cover the period (1557-1604) and contain numerous decisions of Lord Ellesmere. The regular series of Chancery Reports are said to commence with Cary. Choice cases in Chancery form the last few pages of a work called "The Practice of the High Court of Chancery". It is of very little practical value but the report is entertaining reading owing to its picturesqueness and dramatic colouring. Tothill's book was published after his death and according to Chancellor Kent, it is so very imperfect and so destitute of facts and circumstances as to be altogether unfit to serve as a guide and unworthy to be cited as an authority, but it is of great historical interest as presenting the later equity jurisdiction in its rudimentary aspects. Dicken's reports cover the period from 1559-1798. These reports were prepared from Dicken's notes after his death. He was a Registrar of the Court of Chancery and cases where his own suggestion to the Court was accepted are valuable according to Lord Cottenham.

Reports in Chancery now known as Chancery Reports purport to report cases of the reign of Charles I, Charles II, James II, William III and Queen Anne. The first volume of the first edition appeared in 1693. The book as it is at present is in a line of succession from certain precedent works, now merged in it. The first two parts are mere extracts from Registrar's books and as such loose and meagre and possess little authority. The later parts seem to be good about which later.

SUMMARY OF ENGLISH CASES.

GRAINGER *v.* MAXWELL, (1925) 2 K. B. 376.

Income-tax—Computation of—Exchequer Bonds and War Loan securities—Redemption of War Bonds prior to year of assessment—Interest received in preceding year—If basis of taxation—Income-tax Act, 1918, *Sch. D, Case III, Rr.* 1 *and* 2.

An assessee held certain Exchequer Bonds and War Loan securities yielding interest. The former were redeemed in February, 1920, but the latter were yielding interest during the year ending 5th April, 1921. Under the Income-tax Act, 1918, Sch. D, Case III the Inspector of Taxes claimed that the basis of calculation was the full amount of interest received within the previous year ending with 5th April, 1920 and that

the assessee was liable to pay on that basis. *Held,* the liability to pay income-tax depended upon there being in the year of assessment profits of the kind assessed and recourse to the previous year was not permissible when there was nothing in the year of assessment to measure. The assessee would therefore not be liable to pay tax on interest from Exchequer Bonds.

LAURIE AND MOREWOOD *v.* JOHN DUDIN AND SONS, (1925) 2 K. B. 383.

Sale of goods—Delivery note—Goods in the possession of wharfinger—Larger bulk—Note sent to wharfinger—Title if passes—Estoppel—Delivery note if a document of title—Sale of Goods Act, Ss. 25, 47.

A person had some 618 quarters of maize lying with the defendants who were wharfingers. He sold to *X* 200 quarters of it and gave him a delivery note, which in turn was sold to the plaintiffs and they presented to the defendants a delivery order in the following terms :—" Deliver to Messrs. Laurie and Morewood 200 quarters maize " and at the same time the original delivery note was handed over to the defendants who noted it in their stock book. A few days later the owner countermanded delivery and when the plaintiffs applied for the maize sold to them, the defendants refused delivery. In an action against the defendants, *Held,* (1) according to English law, the effect of the delivery order was not to make the plaintiffs tenants-in-common of the whole mass. No right passes to the vendee until the vendor has made his selection ; (2) the receipt of the delivery order in the ordinary course of business without acknowledging it cannot estop the defendants from alleging that the plaintiffs are not the owners ; and (3) the delivery note in the case was not a document of title within the meaning of the Sale of Goods Act.

ISAACS AND SONS, LTD. *v.* COOK, (1925) 2 K. B. 391.

Defamation—Libel—Privilege—Report by High Commissioner in London to Prime Minister of Australia—Commercial matters.

A report sent to the Prime Minister of Australia by the Australian High Commissioner in London containing defamatory statements is absolutely privileged as it is a communication relating to matters of State. The fact that it relates to commercial matters does not make it any the less an Act of State.

BENTON *v.* CAMPBELL, PARKER AND CO., LTD., (1925) 2 K. B. 410.

Principal and agent—Sale by auctioneer—Fact of agency disclosed, but not name of principal—Absence of title—Liability of auctioneer.

An auctioneer who sells a specific chattel by auction, disclosing the fact of agency but not naming his principal and pays over the proceeds of sale to the principal is not liable in damages to the buyer if it afterwards appears that the principal had no right to sell.

Where an agent purports to make a contract for a principal, disclosing the fact that he is acting as an agent but not naming his principal, the rule is that unless a contrary intention appears, he makes himself personally liable on the authorized contract. It is presumed that the other party is unwilling to contract solely with an unknown man, but only if the agent will make himself personally liable if called on. But this presumption does not apply in the case of a sale of a specific chattel which the buyer knows is not the property of the agent.

LANKESTER *v.* LANKESTER, (1925) P. 114.

Divorce—Adultery—Connivance of husband—Invalid American divorce—Arrangement between husband and wife—Marriage of wife after divorce—Knowledge—Matrimonial Causes Act, Ss. 30 and 31.

An English husband and wife were erroneously advised that a divorce obtained in the United States of America would dissolve their marriage. They arranged to carry out the plan and the wife told the husband that after divorce she was going to marry *X.* The divorce was effected as planned and the wife married *X.* Subsequently the husband being informed that the divorce was not valid in England, applied for divorce in the English Courts on the ground of his wife's adultery with *X.* *Held,* his conduct amounted to connivance and even if it did not, it was wilful misconduct which conduced to the adultery and a Matrimonial Court could in its discretion refuse to grant a divorce.

THE LORD STRATHCONA, (1925) P. 143.

Shipping—Mortgagee applying for sale—Charterparty—Notice of—Order for sale—Right of charterers to intervene—Inability of shipowner to perform contract—Effect of.

The mortgagees of a ship obtained an order declaring the validity of their mortgage and directing the sale of the ship, the owners being *ex parte*. Thereupon certain persons to whom the vessel had been chartered for a number of seasons intervened, disputing the validity of the mortgage, and claiming that the charterparty was binding on the mortgagees as they had notice of it at the time of the mortgage and for an injunction restraining the sale. *Held*, (1) they had no *locus standi* to dispute the validity of the mortgage ; and (2) where the owners themselves were financially in such a position that they were unable to perform the terms of the charterparty, a sale by the mortgagees would not interfere with the rights of the charterers, as the charterparty had become impossible of performance.

Quaere :—Whether a charterparty with the owner of a ship bind a subsequent mortgage with notice ? Case-law referred to.

In re TAYLOR : HOCKLEY *v.* O'NEAL, (1925) 1 Ch. 739.

Will—Construction—Trust for maintenance—Child—When includes illegitimate child—Knowledge.

There was a direction in a will to the trustees appointed thereunder to hold a certain share " for the child or children of *X*, who being a son shall attain the age of twenty-one or being a daughter shall attain that age or marry ". *X* died in the lifetime of the testatrix, leaving only one daughter, but the child was born a few months before the marriage of its parents. The testatrix knew of the existence of the daughter, but not that it was illegitimate. On a question arising whether the provision in the will enured to the benefit of the child, *held*, the child was not entitled to benefit under the will.

Prima facie the words " child or children " mean only legitimate children and no other meaning can be given unless there is clear evidence in the will itself of an intention to establish another application of the words. This *prima facie* meaning can only be departed from in two classes of cases, *i. e.*, first, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest; and secondly, where on a just and proper construction, there is a clear intention to include illegitimate children also.

In re PORTER : PORTER *v.* PORTER, (1925) 1 Ch. 747.

Will—Construction—Bequest—Masonic temple—Balance for masonic charities—Bequest void for uncertainty.

A codicil attached to a will directed the executors to pay to the trustees of a masonic temple already erected by him " a sum of £10,000, the interest of such sum to be applied by the trustees to the maintenance and upkeep of the said masonic temple in the full and sole discretion of the said trustees, and the balance (if any) to be applied or paid annually in favour of any masonic charity or charities which the said trustees may in their full discretion select." On a summons being taken out to ascertain if the bequest was valid or not, *held,* the bequest to the masonic temple was not a good and charitable bequest, and involving, as it did, a perpetuity must fail. As the primary gift itself was not sufficiently definite, it could not be ascertained whether any surplus would be left over for the ultimate charities and hence the whole bequest was void.

UNION CASTLE MAIL STEAMSHIP COMPANY *v.* SENA SUGAR ESTATES, LTD., (1925) A. C. 782 : 94 L J K B 877.

Contract—Construction—Agreement to ship "all sugar which the shippers shall have for shipment from B"—Breach of—Through bill of lading—Effect of.

The owners of a sugar estate used to send all their sugar from a small port C, which was not accessible to ocean-going steamers, to B by lighters and from there it used to be loaded into the ocean-going steamers. An agreement was made between the owners and a steamship company, whereby the owners agreed to ship and the shippers agreed to carry " all the sugar which the shippers shall have for shipment from B " for a fixed period. During the period of the agreement the owners sent sugar by another steamship company from C direct, through bills of lading being issued from C itself, though the process adopted was the same, *i. e.,* to send the sugar by lighters to B and then load it into ocean-going steamers. On an action for breach of the agreement, *held,* the issue of through bills of lading did not in any way affect the liability of the sugar estate owners, as the sugar fell within the agreement and ought to have been given over to the shippers under the agreement.

BUNGE Y BORN LIMITADA SOCIEDAD... *v.* BRIGHTMAN AND CO., (1925) A. C. 799 : 94 L. J. K. B. 840.

Shipping—Charterparty—Exception clause—Demurrage—Liability for—Loading prevented by Railway strike—Prohibition of export—Effect of.

Under the terms of a charterparty a ship was to be loaded with wheat or maize or rye. One clause provided that if the loading was prevented by reason of obstruction or stoppage in the railway service, the time for loading should not count during the continuance of such causes. Owing to a Railway strike, sufficient wheat was not forthcoming to load the ship within the lay days, but when wheat began to be loaded actually, the Government prohibited the export of wheat and the charterers after six days began to load maize. The shippers claimed demurrage. *Held,* as the obstruction in the railway service merely delayed the bringing in of the cargo and not the actual process of loading, it did not fall within the exception clause and hence demurrage was payable.

Per Lord Dunedin.—If an exception clause in a charterparty is intended to apply to the providing of cargo as distinguished from the loading proper, the intention must be expressed in words so clear as to admit of no ambiguity.

Per Lord Atkinson.—When the export of wheat was prohibited, the charterers had to make up their minds what was to be done in the altered condition of things and they were in law entitled to a reasonable time to determine how to deal with those altered conditions.

WING LEE *v.* D. C. LEW, (1925) A. C. 819.

Appeal—Appellate Court—Power of, to grant new trial—Discretion—Exercise of—Injustice to be prevented.

An Appellate Court's right to order a new trial is one based on discretion, but the discretion being judicial must be based on sound principles and cannot be arbitrarily exercised; but if the exercise of the discretion without control or limitation may produce what appears to be a manifest injustice, it is well within the power of the Court in exercising such a right to take steps to prevent that injustice should arise.

WIGMORE *v.* SUMMERSON, 94 L J K B 836.

Income-tax—Stock sold—Interest accrued—If taxable—Liability to super-tax—Income-tax Act, 1918, *Sch. D, Case III.*

When a security bearing interest which is not taxed at the source (*e.g.* War Loans) is sold by one person to another during

the currency of an interest period, an apportionment cannot be made for purposes of income-tax and the seller is not liable to pay tax on accrued income up to date of the sale. In such a case interest does not accrue *de die in diem*. The seller does not receive from the buyer the interest accrued up to the date of sale, but only the price of the expectancy of interest and that is not the subject of taxation.

Where a security which suffers tax on the interest by deduction is sold during the currency of an interest period, the seller is likewise not chargeable with super-tax on the accrued interest.

JOTTINGS AND CUTTINGS.

The Foreshore and Manorial Wastes.—*Blundell* v. *Catterall* (1821, 5 B. & Ald. 268) and *Brinckman* v. *Matley* (1904, 2 Ch. 313) were cases where the plaintiffs sued as lords of manors, and the foreshore was admittedly manorial waste. Thus the section should relegate the Holroyd judgment to the waste of overridden law. But is it possible for the foreshore to be waste other than manorial waste ? If so, it would not apply. Obviously, however, if the wayfarer who sees moor, down or beach before him has to ask himself " Is this waste really manorial ?" there is no virtue in the section. A presumption in his favour ought therefore to be implied, but the section would have been more satisfactory had it been expressed. When the foreshore is privately owned (and it is a common error to suppose that the Crown has retained any large portion of it, see *Moore on the Foreshore,* 3rd edit., p. 24), the Crown records of grants will no doubt show the position. For the places where the Crown has retained the foreshore, reference may be made to S. 208 of the Law of Property Act, 1925, to the effect that the Crown is bound by it, with certain exceptions which do not include the provisions of S. 193. Thus bathing off the foreshore round the whole coast of England and Wales should be allowable next year, except so far as it has been reclaimed from waste by the construction of harbours, wharves or other works. The Minister of Agriculture has power to make rules regulating the exercise of the new rights to prevent derogation of those of the owner, and in the case of the foreshore he will no doubt preserve the right of reclamation. The Holroyd judgment was largely based on the interference of a right of bathing with the right of reclamation,and has delayed the simple or common-

sense solution of a difficulty which can only have existed in lawyers' minds for a hundred years or more.

—*The Law Journal*, September 12, 1925, p. 786.

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The Divorce Court and the Discretion.—"This discretion," said the President of the Probate, Divorce and Admiralty Division, in *Wilson* v. *Wilson* (1920, P. 20 at p. 22), " is not to be exercised eagerly, or indeed readily, but with some degree of stringency." He referred to the judicial discretion under the Matrimonial Causes Act, 1857, S. 31, to grant relief to a petitioner in divorce, who has himself been guilty of adultery. He gave four reasons which may satisfy the requirement of " stringency ": the position and interests of the children ; the interest of the woman with whom he has misconducted himself, that she may be in a position to marry him ; the fact that withholding the decree will not be likely to reconcile husband and wife ; and the interest of the husband himself that he shall re-marry and lead a respectable life. These are not all the available reasons, nor are all of them indispensable ; but the sense of the decision is clear, that, whatever the reasons are, they must be of this quality and of an equivalent quantity. Meanwhile, for our present comment, it is important to note that the discretion remains absolutely with the Court, unfetterable by this or by any decision of principle (*Wickins* v. *Wickins*, 1918, P. 265, C. A.). With this preface, we may call attention to the observation of Bateson, J., in the case of *Hardy* v. *Hardy and Phillips* (*Times*, October 27) : " The authorities show a steady relaxation in recent times of the strict rule of former days, depriving petitioners, who had themselves been guilty, of relief." We may add the observation of our own, that the most recent cases, in which the King's Proctor has intervened and the petitioner, caught concealing his own guilt, has prayed the discretion and obtained it, show a particular rapidity of this process of relaxation. The discretion is certainly now exercised " readily " ; if progress continues proportionately, it will not be long before it is exercised " eagerly." As to the moralities and expediencies, it is not for us to comment ; our remark goes to this alone, that every practitioner, concerned with a client who has a divorce matter or likely to be so concerned, would do well to note carefully just how far the relaxation of stringency is proceeding.

—*The Law Journal*, November 7, 1925, p. 906.

BOOK REVIEWS.

TRIAL OF RONALD TRUE. Edited by Donald Carswell— *Notable British Trials Series*. Messrs. Butterworth & Co., Ltd.

The trial of Ronald True which took place in 1922 at the Old Bailey before Mr. Justice M'Cardie is one of extraordinary interest not only to the layman, but to the lawyer and the medical practitioner as well, on account of the medico-legal dilemma which arose out of the plea of insanity. The layman will feel all the interest which usually attaches itself to a *cause celebre ;* but the lawyer's interest will mostly be in the application of the rules laid down by Her Majesty's Judges in answer to the Resolution of the House of Lords, arising out of M'Naughton's case of 1843 to a recent case, especially in the light of the developments of medical science during the last 80 years. The evidence, especially of Dr. East who was examined at length as a defence witness to support the plea of insanity will be of absorbing interest to the lawyer as well as the medical practitioner on account of the discussion of the principles as applied to various sets of facts.

The volume under review maintains all the well-known features of the Notable British Trials Series. It contains a neat and concise historical narration of the facts of the case, and a brief reference to the law relating to insanity as a ground of defence in order to enable the reader to appreciate and follow the course of the trial. The Appendix contains, among other things, the opinion of the Judges in M'Naughton's case of 1843 and also the report of the Committee presided over by Lord Justice Atkin on Insanity and Crime which was appointed by the then Lord Chancellor, Earl of Birkenhead, as a result of this sensational murder trial. We have great pleasure in bringing this volume to the notice of our readers.

SNELL'S PRINCIPLES OF EQUITY, 19th Edition Special Indian Edition, by Messrs. Cambray & Co.

We are so familiar with Snell's Principles of Equity as a text-book on the subject that no detailed review of its contents is called for ; but it is only necessary to refer to some of its features in the present edition. The far-reaching changes effected by the recent statutes relating to the Law of Property in England have rendered it desirable that a separate

chapter should be devoted to equitable estates, priorities and assignments. In other places, the changes effected by the new statutes have been incorporated ; and despite the mass of new material and the impossibility at present of disregarding altogether the law superseded after the year 1925 by the provisions of new statutes the size of the book has not increased substantially. We are sure that the book will still continue to hold its high place as a text-book and its usefulness both to the student and practitioner. This Special Indian Edition, a copy of which we are glad to acknowledge the receipt, has been published by Messrs. Cambray & Co., the enterprising law book-sellers and publishers of Calcutta and Madras.

GHOSH'S DIARIES.

We are glad to acknowledge receipt of Ghosh's popular Lawyer's Diary and Pocket Diary for 1926 published by Raj M. C. Sarkar & Sons, Calcutta.

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NOTES OF INDIAN CASES.

DADACHANJI *v.* RATANBAI, I. L. R. 49 Bom. 167 : 47 M. L. J. 850 (P. C.)

In this case, a Parsi by his will directed his executor to maintain himself and the testator's son and to defray the expenses of educating the son out of the testator's property and effects and to make over the remaining property to the son on his attaining majority and the question was whether the bequest to the son created a vested interest in him which would descend to his heirs even if he died before attaining majority or only a contingent interest. The provision of law that their Lordships had to consider was the exception to S. 107 of the Succession Act which had been extended to the Parsis. This section and the exception thereto have been made applicable to the Hindus, Jains and Sikhs governed by the Hindu Wills Act. The question will naturally require consideration whether if a similar point were to arise in the case of the will of a Hindu not governed by the Hindu Wills Act if there are any rules to guide us. It is too much to expect the ancient Hindu Law to have anything to say on such complex provisions in wills or settlements ; and all that can be said is that there is nothing in it to discountenance such dispositions. The English law on this subject is highly technical and in some respects there is a conflict of judicial opinion. The principle underlying the English decisions on this branch of law has been stated by Page Wood, V. C. in *Pearson* v. *Dolman* (1) as being that " where the principal is given at a distant epoch and the *whole income* is given in the meantime, the Court leaning in favour of vesting has said that the whole thing is given." In the case before their Lordships, even assuming every other condition to be present, it was not the income of the property bequeathed, much less the whole of it that was

1. (1866) 3 Eq. Cases 315 at 321.

given for the maintenance or benefit of the legatee. Again, where any portion of the income is applicable to any purpose which is not for the benefit of the legatee it is well settled that the legatee does not get a vested interest in the legacy but only contingent on his attaining the age ; and reference has been made by their Lordships to *Gossling In re, Gossling* v. *Elcock* (2) in this connection.

We are not sure whether too much emphasis can be laid in the decision of this case on the circumstance that the property which will vest in the son in possession on his attaining majority could not be predicated or ascertained earlier, as the same consideration may be said to exist in many cases of the dispositions of residuary estate, and the rule under consideration has been said to be applicable *a fortiori* to bequests of the residue. Cf. *Usher In re, Foster* v. *Usher* (3).

It may perhaps be not out of place here to refer to some points of comparison that may be suggested between the English rule and the exception to S. 107 of the Succession Act. In the first place, in England the rule gives rise only to a presumption of vesting which may be rebutted. *See* 28 Halsbury, 815. Here, the exception would seem to enact a rule of law. On the question where a trustee or executor is directed to apply so much of the income as he may consider necessary for the maintenance or education of the legatee and the balance of income and the legacy are given to the legatee on attaining a particular age, the English law is by no means settled whether the legacy is vested or contingent. See *Usher In re, Foster* v. *Usher* (3) where the prior cases are reviewed and the conflict of decisions pointed out. The exception to S. 107 would seem to adopt the view of Jessel, M. R. in *Fox* v. *Fox* (4) that the gift of so much of the interim income as may be necessary to be applied for the benefit of the legatee would render the legacy vested. Again a mere provision for maintenance out of the income to the legatee has been held in England not to make the legacy a vested legacy. *Watson* v. *Hayes* (5). It is doubtful whether this is the necessary effect of the exception to S. 107.

In this state of English authorities and especially having regard to the caution which has been frequently urged by their Lordships of the Privy Council against importing into this country the English rules of construction of wills in

2. (1902) 1 Ch 945.

3. (1922) 2 Ch 321 at 326.

4. (1875) 19 Eq Cases 286.

5. 5 Myl and Cr. 125 at 133.

Norendra Nath Sircar v. *Kamal Basini Dasi* (6) and in later cases it may be suggested that though S. 107 and the exception thereto may not in terms apply to moffusal wills outside Bengal and outside the cities of Bombay and Madras, they may be adopted as embodying the principles guiding the construction of Hindu wills not governed by the Hindu Wills Act. It cannot, however, be said that even if we adopt this rule, we shall not have to resort to English decisions in some respects for our guidance. *See* Trevelyan's Hindu Wills, p. 111 (2nd edition). Reference may be made in this connection to S. 21 of the Transfer of Property Act and the exception thereto applicable to other transfers though they are not to affect rules of Hindu law to the contrary, if any.

COLE *v.* NANALAL MORARJI, I. L. R. 49 Bom. 172.

This decision of the Bombay High Court points clearly to the distinctive characteristic of a hire purchase agreement, the nature of which is perfectly well understood in England but whose imperfect understanding has resulted in what the parties apparently wanted to express as a hire purchase agreement having failed in its purpose and having been construed as a sale with an agreement as to payment of the price in instalments. The circumstance that marks out a hire purchase agreement from an agreement to sell or to purchase or a sale is that there is only an option in the hirer to take a purchase of the thing hired and no obligation on his part to pay the price or to buy the article. The question of the nature of the contract being one depending on its construction, it is purely one for the Court on a consideration of the rights and obligations of the parties having regard to the whole of the agreement, and it is not open to parties to escape the consequences of an agreement to sell by merely calling it a hire purchase agreement. Cf. *Helby* v. *Matthew* (1). Consequently where the parties impose on the hirer the obligation to keep the article for the whole period which will convert him to an owner and to pay the entire rent which would be equal to the price, the nature of the contract is really one of an agreement to sell the thing. If, however, on the other hand, the agreement obliges the hirer to keep the thing and pay the hire for a period which is not the full period to convert him into an owner and gives him the option to return it after the period, the agreement would only be one for a hire purchase. *Belsize Motor Supply*

1. (1895) A C 471 at 475. 6. (1896) I L R 23 C 563 (P. C.)

Company v. *Cox* (2). The distinction between the two classes of cases has frequently become material in cases where the hirer has pledged and sold the article to a stranger who takes it in good faith without knowledge of the agreement and the question has arisen whether the owner can recover it from the stranger pledgee or purchaser. Where the nature of the original transaction is merely a hire purchase agreement, the hirer not having had juridical possession of the article any vendee or pledgee from him cannot keep it as against the owner. See *Leon Saubolle* v. *K. V. Seyne and Bros.* (3). On the question of damages recoverable in such a case by the owner from such stranger, although the ordinary rule is the full value of the thing detained or converted, it has been held by the Court of Appeal that where there has not been any repudiation of bailment, the owner cannot recover more than the balance of the amount payable under the agreement if the vendee or pledgee is willing to pay it duly. *Whiteley* v. *Hilt* (4). If, however, the transaction amounts to a sale or an agreement to sell under which the property has passed to the buyer, the original owner cannot recover as against the buyer or pledgee ; and this is what happened in the case under notice.

MANJAYA *v.* SESHAGIRI, I. L. R. 49 Bom. 187.

That a surrender by a Hindu widow to operate as such and accelerate the estate of the reversioners must be to the entire body of the next presumptive reversioners and not merely to some of them is well settled after the decision of the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan* (5). Even before that decision, the Bombay High Court acted upon this rule in *Dodbasappa Ramlingappa* v. *Basawanappa* (6). In spite of the fullness with which the subject has been discussed in *Rangasami Goundan* v. *Nachiappa Goundan* (5) the exposition by their Lordships of the theory of surrender by a Hindu widow is by no means cogent in all its particulars. This has been fully discussed in a leading article "Adoptions and Alienations by Hindu Widows" (7) to which reference may be made in this connection.

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2. (1914) 1 K B 244 at 251.
3. (1918) 23 C W N 552.
4. (1918) 2 K B 808.
5. (1918) I L R 42 M 525 : 36 M L J 493 (P. C.).
6. (1918) I L R 42 B 719.
7. (1919) 36 M L J 55 (Jour.)

BARENDRA KUMAR GHOSE *v.* EMPEROR, I L R 52 Cal. 197 : 48 M L J 543 (P. C.).

This decision of their Lordships will hereafter be looked upon as the most authoritative exposition of S. 34 of the Indian Penal Code and as settling the conflict of judicial opinion that has existed on its construction. Although in the construction adopted by their Lordships, cases falling under Ss. 149 and 114 of the Code may in some instances overlap in their application S. 34, any other construction of this latter section would render its enactment useless as a mere statement of a platitude.

The case under notice is also useful as indicating their Lordships' view on cl. 41 of the Letters Patent of the Calcutta High Court although they do not give their decision on the question. Notwithstanding the loose expressions often used by the Privy Council that they are not a Court of Criminal Appeal, that it is not their constitutional position in criminal matters and that it is outside their jurisdiction to entertain criminal appeals in some instances, vide *Clifford* v. *King-Emperor* (1), *Muruga Goundan* v. *King-Emperor* (2), *Bugga* v. *The King-Emperor* (3) and *Rustom* v. *King-Emperor* (4), " the question is not one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless such power and authority have been parted with by statute is undoubted." *Arnold* v. *King-Emperor* (5). Again as observed by Lord Haldane in *Rustom* v. *King-Emperor* (6), there is a constitutional right of appeal even in criminal matters to the King-Emperor. What is more important is that in the class of cases falling within the terms of clause 41 of the Letters Patent, the Privy Council is expressly constituted a Court of Criminal Appeal. But the Privy Council does not interfere with the decisions of the lower Courts in criminal cases in the exercise of the appellate powers except under the circumstances mentioned in *In re, Dillet* (7), *i. e.*, when the rules of natural justice have been violated and grave injustice has been done. The case of civil appeals to the Privy Council where their Lordships do not ordinarily interfere with the concurrent findings on facts, although the Privy Council is undoubtedly a court of

1. (1913) I L R 41 C 568 (P C). 2. (1921) 14 L W 558 (P C).
3. (1919) M W N 748 (P C) 4. (1923) I L R 48 B 515 (P C).
5. (1914) I L R 41 C 1023 at 1065, 1066 (P C).
6. (1923) I L R 48 B 515 at 517 (P C). 7. (1887) L R 12 A C 459.

appeal bears some analogy in this connection. The correct position of the Privy Council in criminal matters has been stated by the Calcutta High Court in this very case when it was before it in *Barendra Kumar Ghose* v. *The King-Emperor* (8) where all the cases have been referred to and considered.

It has, however, to be mentioned that, in this case, the Calcutta High Court lost sight of the fact that the appeal was not one from the decision of the High Court on its original criminal jurisdiction or where points have been reserved as under clause 25 of the Letters Patent by the Judge exercising the original criminal jurisdiction. We are not sure whether the learned Judges considered the jurisdiction exercised in the case as being original criminal, as it was in the nature of a review of a decision on the original criminal side. But no arguments on this head appear to have been advanced before the High Court. In *Reg* v. *Reay* (9), Sir Michael Westropp, C. J., sitting with Gibbs and Melville, JJ. was of opinion that an appeal would lie to the Privy Council in criminal matters even in cases where the High Court reviews a decision of the High Court in exercise of the original criminal jurisdiction under a certificate of the Advocate-General. The attention of their Lordships of the Privy Council does not seem to have been directed to this case, although on the language of the clause of the Letters Patent there is much to be said in favour of the contention of the respondent before the Privy Council.

It is difficult to appreciate the hyper-criticism of their Lordships on the expression "leave to appeal" at p. 219 in the case under notice as applied to appeals to the Privy Council, especially in view of R. 2 of the Judicial Committee Rules of 1908 which has been repeated in the new rules of 1925, which provides that all appeals shall be brought in pursuance of leave obtained from the Court appealed from or in the absence of such leave, in pursuance of special leave to appeal by the Privy Council. Although Art. 41 of the Letters Patent is silent as to the conditions under which leave to appeal will be granted in criminal cases, the object of the appeal being the interference by His Majesty in Council with the decision of the Subordinate Court on a criminal matter, it will only be granted in cases

8. (1923) 28 C W N 377. 9. (1870) 7 Bom. H C R (Cr.) 77.

where there is a *prima facie* case answering to the conditions referred to in *Dillet's case* (7). See *Bal Gangadhar Tilak, In re* (10), and *Barendra Kumar Ghose* v. *The King-Emperor* (8).

RAGHAVENDRA GURU RAO *v.* MAHIPAT KRISHNA, I L R 49 Bom. 202.

It has been held in this case that when a surety keeps alive his liability by an acknowledgment or otherwise and pays the guaranteed debt to the creditor, he can recover the amount from the principal debtor although at the date of the payment the rights of the creditor against the principal debtor might have been barred by limitation. It can hardly be doubted that if the surety's liability as well as the principal debtor's liability was barred at the date of the payment by the surety, it would have been purely voluntary and the surety cannot recover the amount against the principal debtor. *In re, Morris : Coneys* v. *Morris* (1). It must, however, be admitted that even in this latter case, the payment by the surety of a barred debt would not be " wrongful " to use the expression in S. 145 of the Contract Act, which was considered by the learned Judges of the Bombay High Court ; and there is statutory recognition in S. 60 of the Act that a barred debt is none the less lawfully due from the debtor. Construing the section in the light of the illustrations to it, the words " rightfully " and " wrongfully " in S. 145 do not bring out clearly the intention of the section which seems to be that in some cases the principal debtor may be liable to pay the surety a larger sum than the amount of the primary liability as where the surety has incurred costs in reasonably defending *bona fide* an action by the creditor. *Cf.* also S. 125.

It has been said that where a surety is compelled to pay to the creditor, he recovers it from the principal as money paid for his use and the form of the pleading in the action is for money paid by the plaintiff for the debtor at his request, express or implied. *In re, Morris : Coneys* v. *Morris* (2). But it may well be doubted if the implication of the request to pay by the debtor can be raised in cases where his liability to the

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7. (1887) L R 12 A C 459. 8. (1923) 28 C W N 377.
10. (1908) I L R 33 B 221.
1. (1922) 1 I R 81 and 136. 2. (1922) 1 I R 81 at 83.

creditor is statute-barred. There is authority in support of the view that as between co-debtors, when the liability of one of them is kept alive by part payment of the debt to the creditor and he discharges the liability in full at a time when the liability of the others is statute barred, he can nevertheless recover the excess over his share of the debt from his co-debtors, under their implied duty to contribute or indemnify. *Gardner* v. *Brooke* (3). The principle of this decision would seem to support the decision of the learned Judges in the case under notice.

There is, however, one argument against the decision which may be noticed here but which has not been dealt with there. It has been well settled in Equity that it is open to the surety even before payment by him of the guaranteed debt to call upon the principal debtor to exonerate him from the liability after the debt has accrued due and become payable and he can even call upon the principal debtor to set apart a sum to answer the liability. *Wooldridge* v *Norris* (3) and *Lacey* v. *Hill* : *Crawley's claim* (5). This principle has been recognised and acted on by the Privy Council in appeal from the Straits Settlements in *Eastern Shipping Company, Limited* v. *Quah Beng Kee* (6). If then the surety has his right of action against the principal debtor immediately as the original debt accrued due or at any rate when the demand is made on him by the creditor he cannot unduly prolong the time for suing the principal debtor by making the payment out of time and claiming on it against the principal. This argument seems to meet with the approval of De Collyar in his well-known book on Guarantee, 3rd edition, pp. 311, 312. It is also noticed by Powell, J. in the Court of Chancery in the case of *In re, Morris* : *Coneys* v. *Morris* (1) above referred to; but the learned Judge has not given his decision on the point. We may perhaps venture to submit that when the surety sustains damage by being compelled to pay, it gives rise to a fresh cause of action against the principal debtor on the payment although it was made at a time when the principal debtor's liability to the creditor was barred. Cf. *Wolmers Hausen* v. *Gullick* (7) and *Gardner* v. *Brooke* (3).

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1. (1922) 1 I R 81.
3. (1897) 2 I R 6.
4. (1868) L R 6 Eq Cases 410.
5. (1874) L R 18 Eq Cases 182.
6. (1924) 34 M L T 90 (P C).
7. (1893) 2 Ch 514

BARADA KANTA SAHA ROY *v.* SHEIKH MAIJUDDI, I L R 52 Cal. 275.

The judgments of the learned Judges composing the Full Bench in this case have brought out fully the anamolies that exist in the Code of Civil Procedure of 1908 as regards the powers of the Provincial Small Causes Courts to effect an attachment before judgment of immovable properties. The majority of the Full Bench have held that there is the power in the Small Causes Court to order an attachment of immovable property before judgment but that the attachment has to be effected by an ordinary Civil Court and that all claims to the attached property have to be investigated by the latter Court. The view of the other Judges forming the minority has the effect of negativing the power of the Provincial Small Causes Courts to attach even movable properties before judgment which power they undoubtedly possessed under the prior Code of 1882, a result which could hardly have been intended by the Legislature. We, however, venture to doubt whether an order of attachment has really got to be "executed" with all the formalities prescribed by O. 21 of the Code, as for instance by putting an application for execution in the manner provided by O. 21, R. 11. It is not every order which is given effect to in the course of a suit or otherwise which requires to be executed under S. 36 of the Code. Cf. *Parvathammal* v. *Chokkalinga Chetty* (1). We doubt whether the section has not reference only to executable orders in the strict sense of the term, like orders for costs, etc. It is therefore not easy to see why the Small Causes Court may not itself attach the immovable property after ordering its attachment and investigate summarily the claims regarding the same. Incidental investigations into the titles to immovable properties or rights to the same are not altogether beyond their powers. *Cf.* S. 23 of the Provincial Small Causes Courts Act under which it is optional for Small Causes Courts to try incidentally questions of title to immovable properties. We doubt therefore whether after an order for an attachment of immovable properties is made by the Small Causes Court, it should go to an ordinary Civil Court for effecting the attachment. *Cf.* 20 C. W. N. 178 (Journal). Whatever may be the correct view on this point, the question is one which ought to engage the early attention of the legislature as

1. (1917) I L R 41 M 241.

the matter is of frequent occurrence, especially as it cannot be remedied by the High Courts under their rule-making power. The question came up recently before the Madras High Court in *Kothandarama Chetty* v. *Annamalai Pillai* (2) where the learned Judges held that a Provincial Small Causes Court has power to attach immovable properties before judgment under the Code of Civil Procedure of 1908, and no distinction has been made between the power to order an attachment before judgment and the power to effect the attachment, apparently because no such distinction was sought to be made. It is significant that the attention of the learned Judges in the Madras case was not drawn to *Sadek Ali* v. *Samed Ali* (3) or to the Full Bench decision under notice which had been reported in 28 C. W. N. 1056 ; and the authority of the case in *Kothandarama Chettiar* v. *Annamalai Pillai* (2) is, we apprehend, distinctly weaker for this omission.

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2. (1924) 48 M L J 406. 3. (1923) 28 C W N 16.

MANZUR HASAN *v.* MUHAMMAD ZAMAN, I. L. R. 47 All. 151 : 48 M. L. J. 23 (P. C.).

Their Lordships of the Privy Council laid down in this case that the " distinction between indictment and an action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied to India"—thus overruling the cases in India that held that an action would not lie in the absence of special damage. Their Lordships further decide that "in India there is a right to conduct religious processions with appropriate observances along a highway provided the ordinary use of such highway by the public is not interfered with and subject to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace, " and that worshippers in a mosque or temple which abutted on the high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. Their Lordships' judgment on the one hand repels the pretension of every sect or religion when places of worship are upon the route where the processions of those with whom they do not agree pass to insist upon the functions of the procession ceasing ; on the other they recognise the right of magistrates to make any arrangement they choose and if they choose to forbid the doing of *matam* or the peculiar pauses with wailing of a Shiah mohuram procession within a certain distance of the Sunni mosque, only as a special case and not as a general rule.

This is a subject on which there has been considerable divergence of judicial opinion and some Judges were so impressed with the disastrous consequences of the recognition of a general right like that admitted in this case that they questioned the legal right to take processions on a public highway. (*See* 26 M. 554.) Their Lordships had already shown a strong indication of their inclination in *Sadagopachariar* v. *Rama Rao* (1).

FATEH SINGH *v.* JAGANNATH BAKHSH, I. L. R. 47 All. 158 : 48 M. L. J. 64 (P. C.)

The point in this case was one of *res judicata*. First a suit was brought by a person claiming to be a reversioner to set aside certain alienations.

1. (1902) I L R 26 M 376.

Pending suit the widow died. Plaintiff was not the next reversioner though he alleged he was and so under the ordinary Hindu Law his suit would have had to be dismissed. He might have brought his suit for declaration to a hearing as their Lordships say for the purpose of determining in that suit the question of heirship as between himself and the rival claimant or to establish his averment of collusion between the rival claimant and the widow so as to get his costs of the suit. But neither course was regarded hopeful by the plaintiff and he put in an application to amend the plaint so as to contain averments of family custom which would exclude the rival claimant and let in the plaintiff. The Judge would not allow the amendment as it introduced a new case but dismissed the suit with a rider that the death of the lady had given the plaintiff a new cause of action for possession and that he gave him liberty of filing a fresh suit for possession.

Notwithstanding the rider, their Lordships held that the fresh suit for possession on the averment of family custom was barred by the principle of *res judicata*. Their Lordships held that the plaintiff " might and ought to have made the allegation of custom in the previous suit" and was therefore barred. "To prove his nearness of kin, it was essential to him to aver the family custom. He claimed as next heir and his claim was dismissed. He cannot fight it over again." Their Lordships hold that the reservation was *ultra vires* of the Judge and the dismissal barred the suit. The case of *Parshotam Gir* v. *Narbada Gir* (1) which bore a certain analogy to the facts of this case was not cited and we have not accordingly the benefit of their Lordships' explanation of that case. The point of distinction between that case and this is that whereas in that case there was a refusal to adjudicate any point ; in this there was a complete adjudication on the facts so far as the Court thought was properly adjudicable in the case. Their Lordships hold that after the dismissal of the suit on the merits, the reservation was *ultra vires* and of no effect whatsoever.

SUBHADRAYAMMA *v.* VENKATAPATHI, I. L. R. 48 M. 230 : 47 M. L. J. 93 (P. C.).

Pending a suit, an agreement was entered into with one of the plaintiffs therein and the present plaintiff's husband that

1. (1899) L R 26 I A 175.

the former should advance moneys for the litigation up to a certain amount, that he should get it out of the property when recovered, that there should be no compromise without his consent and the consent of a particular vakil,that his money should come out of the property that might be so got by compromise, that the defendant should account for the moneys taken with vouchers, etc. Plaintiff's husband advanced certain amount and on his refusing to advance further amounts without vouchers, defendant gave notice repudiating his obligation under the contract and proposing to make his own arrangements. He compromised the suit and got some money as a result. Neither the plaintiff's husband nor the vakil were consenting parties to the arrangement both being dead at the time plaintiff claimed a charge on the amount got. Her claim was rejected in the High Court on the ground

(i) that the compromise was not the compromise in contemplation of the parties and as such the case did not come within the express terms of the contract ;

(ii) that the contract related to non-existent property and as both parties had repudiated their obligation under the contract it was at an end and further being in the circumstances incapable of specific performance the charge could not fasten itself on the property got by the compromise.

On appeal, the Privy Council held reversing the judgment of the High Court that the proper construction of the compromise was that the consent of the plaintiff's husband and the vakil mentioned was necessary only so long as they lived and having regard to the surrounding circumstances and the absurdity to which the contrary conclusion would lead, such an implied term should be inferred.

(ii) As regards the second point, their Lordships dissent from the view that a contract in respect of the subject-matter of litigation like the one in question relating to the Zemindari of Vizianagram was not one relating to non-existent property although the title to it might be in dispute. They further hold that even in the view that the contract related to non-existent property the party in default was the defendant who declined to give vouchers and the contract had not been terminated by the plaintiff or her husband. In 16 M. 429 a charge such as the present was thought to be analogous to charge on non-existing chattels or debts. In view of this decision, that view

is no longer sustainable. Champerty and maintenance not being illegal in India, there was no objection to such an arrangement and the charge was perfectly valid from the very beginning.

HIRA LAL GHOSE *v.* EMPEROR, I. L. R. 52 Cal. 159.

The learned Judges have held in this case in accordance with the weight of authority on the question that the provisions of S. 360 of the Criminal Procedure Code are mandatory and that the non-observance of the requisites of that section as to the manner of taking and recording the evidence in criminal cases is fatal to the trial and that an accused person cannot be convicted on evidence improperly taken or recorded. In this connection it may be mentioned that the mandatory nature of a provision of law does not necessarily lead to the result that its non-observance nullifies or vitiates altogether the proceedings where it has been disregarded. This was clearly pointed out by the Privy Council in *Walian* v. *Banke Behari Pershad Singh* (1) in considering the effect of non-observance of the provisions of the Code of Civil Procedure regarding minors on the decrees obtained in those suits and their Lordships held that although those provisions of law were imperative in their nature, their non-observance did not vitiate or nullify the proceedings altogether. Having regard to the object of S. 360, which is intended to protect the witnesses and the accused in the case and to prepare an accurate record of the evidence in the case, the learned Judges have come to the conclusion that a non-compliance of the requirements of the section vitiates the trial altogether and renders the conviction and sentence based thereon illegal. Although this may not be the only conclusion possible, there can be no doubt that this is the safer conclusion in the interests of public justice and the accused. A distinction has to be drawn between basing a judgment on evidence which has not been recorded in accordance with the provisions of S. 360 of the Code and using such a deposition in a trial of the witness for perjury as to which reference may be made to our comments on *Emperor* v. *Nabab Ali Sarkar* (2) of 47 M. L. J. (N. I. C.) 65-67.

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1. (1903) I L R 30 C 1021 at 1031 (P C). 2. (1924) I L R 51 C 236.

MAHARAJA OF KOLHAPUR *v.* SUNDARAM AIYAR, I L R 48 M 1.

The legal interest of this—otherwise known as the Tanjore Palace case—is hardly commensurate with its importance, pecuniarily, socially or even historically.

One question of importance in this case was as to the caste of the Tanjore Rajas, involving as it did, incidentally, the question as to the caste to which the royal families of Kolhapur, Satara and the famous Sivaji belonged. On the finding of the learned Judges that Raja Serfoji was descended from an illegitimate descendant of Venkaji, the brother of Sivaji the Great, the caste of Sivaji became a question of secondary importance.

Even assuming that the Tanjore Rajas were legitimate descendants, there was no evidence of their either being Kshattriyas to start with or evidence of consistent assumption of Kshattriya custom or rules. On that finding, their Lordships could not help coming to the conclusion that they were Sudras. The general rule, no doubt, is that a man's caste is that in which he is born and he cannot raise his caste and also that if a man is unable to show that he is of a twice-born caste, he must be a Sudra. But it cannot be that it is open to any party to go back notwithstanding uniform course of conduct over centuries showing the assumption of twice-born customs and rules of the twice born classes or for the matter of that, even uniform assertion of the twice-born caste, and try to prove that the pretensions are not justified and that in its origin, the family was of a lower caste. Hindu Law being largely custom and having regard to the place it allows to family customs such a course, we should think, would be wholly unwarranted; the more so, we think, when the question relates to rules that should govern royal families. Whatever the theory of ancient Hindu Law, the modern theory of sovereignty must concede to ancient kings' plenary jurisdiction to interfere with social and legal rules and when a deliberate departure from ancient customs followed up by subsequent conduct is found, Courts are bound to give effect to such departure. The process of absorption into either the Hindu fold or the Hindu castes has not yet stopped and the scheme of castes has not yet become a wholly cast-iron affair notwithstanding the contribution of Courts to that result.

N I C

The main legal questions in the case were (i) as to the construction of a grant by the Crown, (ii) as to the validity of an adoption by the widow of the late Raja of Tanjore, (iii) as to the validity of what was called a sword marriage, (iv) as to the method of distribution of the property between the illegitimate son and the adopted son of a Sudra.

The East India Company had, by an Act of State, taken possession of the estates of the deceased Raja and subsequently recognising the injustice of the course, restored it to the widows with a clause that the widows should enjoy—after them, the daughter—failing daughter, the next heirs of the Raja. The question was—What estate was conferred on the daughter and who the term "next heirs" included, whether it applied only to people coming after the widow and daughter in the line of succession or whether it would include the adopted son who would have, in ordinary circumstances, taken before the widow. Their Lordships held that the daughter was intended only to take an estate contingent on her surviving the widow and that the intention as regards further devolution was that the heirs inclusive of the adopted son should take provided he was the nearest.

On the evidence of custom adduced in the case their Lordships hold that the status of sword wives was only that of permanently kept concubines. Manu provides that in the case of marriages between a Brahmin and a Kshattriya woman, the woman should hold an arrow. Sword marriages at the best must connote an alliance between a man of higher caste with a woman of lower caste. Marriage with equals according to Manu is to be by the holding of hands.

As regards the mode of distribution of the property, the argument seems to have been that in applying the rule recently laid down by the Privy Council, a distinction ought to be made between an adopted son and a natural son, that first the illegitimate sons should be assumed to be legitimate, and their shares determined on that basis, and the balance should be given to the adopted son. Their Lordships repelled this contention, we think rightly, holding that except in specified cases, the adopted son stood on exactly the same footing as an aurasa and in the calculation of shares, the adopted son should be treated exactly as if he were an aurasa. The result was that in this case where there were six illegitimate

sons and one adopted son, the illegitimate sons got 3|7th and the adopted son 4|7th. Following *Ramalinga Muppan* v. *Pavadai Goundan* (1). Their Lordships applied the principle of representation to legitimate sons of illegitimate sons and gave them the shares of their fathers.

The two points of interest that arose with respect to adoption were : (i) whether an adoption with the consent of the mother-in-law in the absence of other sapindas was good ; (ii) whether an adoption can take place after the property of the husband is lost by confiscation. On both the questions their Lordships held in favour of the validity of the adoption.

As regards the first point it is rather curious that the " presumed incapacity of women to act" independently should be made up by the consent of one similarly situated but the Ramnad case itself recognises the efficacy of such a consent.

On the second point their Lordships refuse to extend the various restrictions imposed on the widow's power of adoption on the ground of the vesting of the property in somebody else to a case like the present—rightly, we think. The practical difficulties in the application of the restrictions are endless and it is unwise to extend them. Much responsibility rests on the shoulders of English Courts in this matter.

One or two minor points of evidence that arose also are worth noting.

First, whether the deposition of a witness who died before his cross-examination could be used. Their Lordships hold, in accordance with English precedents, that it could be —the absence of cross-examination going only to the weight to be attached to such a deposition. Another point was about the admissibility of the judgments in previous litigations relating to the caste of the family ; both the learned Judges hold that they are admissible and Mr. Justice Kumaraswami Sastri goes further and holds that the evidence of witnesses recited in the judgment is also evidence when the depositions themselves are not available.

VENKATADRI APPA RAO *v.* PARTHASARATHI APPA RAO, I. L. R. 48 M. 312 : 48 M. L. J. 627 (P. C).

Two questions arose in this case : (i) as to the power of disposition of a widow over the income of her estate when

1. (1901) I L R 25 M 519 : 11 M L J 599.

there was nothing to show how she wanted to deal with it during her life-time ; and (ii) as to the article of limitation applicable to the case and the starting point.

Here the mother, holding for a life-estate the property of her son which was in the custody of a Receiver pending litigation started by her to establish her title to it on the footing that his adoption was bad and she, as mother, was entitled to it, disposed of by will the income of the estate accrued during her lifetime and the suit was by the legatees to recover the legacies from the heir in possession. On the first point their Lordships must be taken to approve of the course of decisions in Madras that in the absence of evidence of any intention to make it an accretion to the estate, she had the right to dispose of it. On the second point, their Lordships hold that Art. 123 applied to the case although the defendant was not the executor or administrator legally authorised to act and as to the starting point hold on the construction of the will, having special regard to the surrounding circumstances, that the legacy was "payable or deliverable" only after the final determination of the suit in the Privy Council. Their Lordships further hold apparently as a point of general law that the legacy can be said to be payable or deliverable only when the heir or executor has funds in his possession from which the legacies are payable. Their Lordships further seem to approve of the rule of benignant construction of the articles of limitation like Art. 97, 123, when the claim depends on the termination of litigation which takes such termination as the starting point. It is really this rule of benignant construction that is the justification for cases like *Muthu Korakkai Chetty* v. *Madar Ammal*(1) which was a case under Art. 180 of the Limitation Act.

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1. (1919) I L R 43 M 185 : 38 M L J 1 (F B).

PALANI AMMAL *v.* MUTHU VENKATACHALA MONIAGARAR, I. L. R. 48 M. 254 : 48 M. L. J. 83 (P. C.).

On some of the recent rulings of the Privy Council, in connection with partition, a regular tangle of decisions has arisen and this decision serves to remove some amount of it. First, what is the effect of the admitted severance of one member ? Does it involve the severance of the other members also *inter se ?* If it does, does it go so far as to sever not only the branches but also members of the various branches *inter se ?* If any members say that they continued united— have they got to prove an agreement to that effect ? The doubt arose from the following—one cannot fail to regard as a somewhat unhappy language of the Privy Council in *Balabux* v. *Rukhmabai* (1) : "It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases, it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact." In *Hari Baksh* v. *Babu Lal* (2) their Lordships held that partition between two brothers does not, by implication of law, cause a severance between the brothers and their sons *inter se.* Even as regards brothers, Mr. Justice Kumaraswami Sastri vigorously combated the view that the severance of one gives rise to any such implication. Said his Lordship : " If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant reliefs to all of them) and the decree declares the shares of all the members in the items of family property, there will be a severance of status and if others, in spite of the decree, continue to remain joint, it can only be under an agreement express or implied to reunite. But, where from the scope of plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest and the other members neither asked nor evinced a desire for partition *inter se,* the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many co-parceners there are

1. (1903) I L R 30 C 725 at 736 (P C).
2. (1924) I L R 5 Lah 92 : 47 M L J 938.

and their shares) and the status of the others is unaffected by the decree in favour of one member." Their Lordships seem to approve of the view of Mr. Justice Kumaraswami Sastri.

Thus their Lordships say: "The mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be. It is also now beyond doubt that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners." "That the remaining members continued as joint family may be inferred from the way in which the family business was carried on after their previous co-parceners had separated from them." Their Lordships take *Balabux* v. v. *Rukhmabai* (1) as leading authority for the proposition that re-union, if set up, being of rare occurrence has to be strictly proved. So goes one great source of confusion and trouble.

Another trouble with Courts has been to decide what constitutes an unequivocal declaration of intention to divide which, according to the Privy Council, is sufficient to effect a severance.

In *Girja Bai* v. *Sadashiv Dhundiraj* (3) a notice demanding partition accompanied by a suit was held sufficient. In *Kawal Nain* v. *Budh Singh* (4) a withdrawn suit was held sufficient. In the case under review, there was a suit for partition on the footing of a will but that was found invalid and the first Court made a decree for division according to Patnibhagam. There was an appeal from its decision to the Sudder Court. Pending the appeal to the Sudder Court some of the parties compromised by which they agreed not to press the claim for partition but took maintenance with a view to leave the property intact in the hands of the senior line. The Sudder Adalat reversed the judgment of the Lower Court on the question of the Patnibhaga, but felt itself not called upon to divide the estate according to law and left it to parties if discontented with the management of the *head* to sue for partition. The property continued in the hands of the senior branch. The question was as to whether the family had become separated. Their Lordships hold, agreeing with the High Court, that it had not become separated by reason of the proceedings. This is how their Lordships explain the previous decisions. "The fact that any member of a joint family has separated himself

1. (1903) I L R 30 C 725 (P C).
3. (1916) I L R 43 C 1031 : 31 M L J 455 (P C).
4. (1917) I L R 39 A 496 : 33 M L J 42 (P C).

from his co-parceners may be proved by his suing for partition of the joint family property and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedarnath* v. *Ratan Singh* (5) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it and the Board held that no severance of joint status resulted. Their Lordships see no reason to depart from that view although such a plaint, if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained [*Girja Bai* v. *Sadashiv Dhundiraj* (3) and *Kawal Nain* v. *Budh Singh* (4).]. No effective decree can be made for a partition unless all the co-parceners whose addresses are known are made parties to the suit. In the case under review, there was that defect in the proceedings relied upon. This case illustrates the difficulty in carrying out consistently the theory of separation by unilateral declaration. *Kedarnath* v. *Ratan Singh* (5) was before the new theory and is naturally inconsistent with the later decisions in which that case was not noticed. As a result, we have an attempt at reconciliation which is hardly satisfactory. Both the contradictory decisions and the explanation are by their Lordships and the latest decision will naturally govern.

MAINA BIBI *v.* CHAUDHRI VAKIL AHMAD, I. L. R. 47 All. 250: 48 M L J 667. (P. C.).

The point in this case was one of *res judicata*. The plaintiff, a Muhammadan, had sued previously for his share of his ancestor's estate and got a decree for the same on condition of his paying the dower debt due to the widow (defendant) within a specified time. He had failed to comply with the condition and his suit stood dismissed. The question was whether that judgment precluded him from suing again some years after on the footing that the widow had parted with possession and as such had forfeited her right to retain possession entitling him to an unconditional decree for possession of his share, in the alternative, on payment of the amount found due to her on taking accounts in respect of profits accrued since the date of the previous decree. The argument was that the position of the widow was analogous to that of a usufructuary mortgagee and just as a second suit for redemption would not lie, a second suit for recovery of the property held by the widow in lieu of dower also would not lie. Their

3. (1916) I L R 43 C 1031 : 31 M L J 455 (P C).
4. (1917) I L R 39 A 496 : 33 M L J 42 (P C).
5. (1910) I L R 32 A 415 : ~~20 M L~~ J 900 (P C).

Lordships reject the argument as one based on a wholly false analogy, there being no resemblance between the position of a mortgagee whose rights are derived from agreement with the mortgagor and that of a Muhammadan widow whose right to retain the property possession of which has been peaceably and lawfully acquired by her is one conferred by Muhammadan Law. "The right to get immediate possession of the land at the date when a suit to recover is in fact instituted is a wholly different thing, a wholly different *res*" their Lordships say, "from the right to recover it at some future time and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession as actually claimed and would not and did not extinguish the rights of the plaintiffs to the inheritance of or their rights to recover possession of the lands at some future time." Their Lordships accordingly hold that the second suit was not barred.

Their Lordships also hold that the alienees were not entitled to retain possession till the dower debt was paid for the sufficient reason that the right (assuming it could be transferred) had not been transferred to them, all that was transferred to them being the property which the widow claimed to be entitled absolutely in the events that had happened. This appears like a very technical view unless it is to be supported on the ground that the right of the widow is not in the nature of an interest in land but a mere personal right. If it was an interest in immoveable property, having regard to S. 8 of the Transfer of Property Act, that interest would have passed to the transferee.

Their Lordships further hold that the widow had lost her right to retain possession by parting with it in favour of the alienee. Obviously that was not her intention but if her right was incidental to the *fact* of possession, if that possession was lost, her right ceased.

Another point also requires to be noticed. Their Lordships hold that although the previous judgment did not operate as *res judicata* so as to bar the plaintiff from suing afresh for possession, it did bar him from re-agitating the question as to the amount due by way of dower, and as to the state of accounts on the date of the decree. From this it is clear that in their Lordships' judgment the dismissal of a suit has not the result necessarily of wiping out all the findings in favour of the plaintiff.

ASKARAN CHOUTMAL v. THE E. I. RY CO., I L R 52 Cal. 386.

The question that arose in this case as to the limits of Counsel's power to compromise suits by settlement outside the Courts is one of great importance and it is somewhat strange that there is no decision either in England or in this country directly dealing with the question. Notwithstanding the doubts expressed by B. B. Ghose, J., sitting with Walmsley, J., in the case noted at p. 390 doubting the expediency of importing into this country the English rule as to the authority of Counsel to compromise actions in the course of its conduct or trial in Court, there seems to be a large body of judicial opinion that Counsel have such a power irrespective of the client's instructions in that behalf and even contrary to the instructions of clients, provided that such instructions were not known to the opposite party. *Jang Bahadur Singh* v. *Shanker Rai* (1); *Nilmoni Chaudhuri* v. *Kedar Nath Daga* (2); *Nundo Lal Bose* v. *Nistarini Dassi* (3), *B. N. Sen and Bros.* v. *Chuni Lal Dutt & Co.* (4). Since the decisions of the House of Lords in *Neale* v. *Gordon Lennox* (5), it has been considered that if the client has imposed any conditions on the Counsel's right to compromise but Counsel compromised without regard to the conditions, the compromise will not be given effect to by the Court provided that the limitation is brought to the notice of the Court before a judgment by consent is drawn up. *Shepherd* v. *Robinson* (6). There are some observations against the authority of Counsel to compromise actions by arrangements outside the Court by Lord Cranworth in *Green* v. *Crockett* (7); but the manner of the reporting adopted in the case and some of the later observations therein detract to some extent from the case being treated as an authority on the question. In the absence of any clear and binding authority on the point, the discussion by Page, J., in the case under notice is particularly valuable. The conclusion arrived at by the learned Judge after examining all the cases having any bearing on the question is that unless such a compromise is authorised by the party or subsequently ratified by him or his agent, it is not binding on the party and cannot be made a rule

1. (1890) I L R 13 A 272 (F B).
2. (1922) 1 Pat. 489.
3. (1900) I L R 27 C 428.
4. (1923) I L R 51 C. 385.
5. (1902) A C 465.
6. (1919) 1 K. B. 474.
7. 34 L J Ch. 606.

of Court. This would clearly be the case in respect of all compromises effected by pleaders or vakils. They cannot unless specially authorised in that behalf compromise matters in suit. See *Jagapati Mudaliar* v. *Ekambara Mudaliar* (8), *Sourindra Nath Mitra* v. *Heramba Nath Bandopadhyaya* (9), and *Thenai Ammal* v. *Sokkammal* (10). It must be pointed out here that in the last noted case there are some observations against the applicability of the English rule as to Counsel's authority to compromise in this country. Those observations if they were meant as a statement of the law were *obiter* and opposed to the decisions referred to above. The authority of solicitors in England to compromise actions without reference to the client's instructions has been well recognised in the decisions. See *Welsh* v. *Roe* (11). But it is not clear whether this power has been recognised in this country. In America the weight of authority seems to be against it, see *Jagapati Mudaliar* v. *Ekambara Mudaliar* (8) and it is likely that it may not be recognised here. Indeed, there seems to be no reason why the authority of solicitors in this respect should stand on any different or higher footing than that of vakils or pleaders.

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8. (1897) I L R 21 M 274 : 8 M L J 40.
9. (1923) 45 M L J 453 (P C). 10. (1917) I L R 41 M 233.
11. 87 L J K B 520.

CHIRANJILAL RAMLAL *v.* B. N. RY. CO., LTD., I L R 52 Cal. 372.

Mr. Rustomji in his well-known commentaries on the Indian Limitation Act has adversely commented on the observations of D. Chatterjee, J., in *Radha Shyam Basak* v. *Secretary of State for India* (1) restricting the operation of Art. 31 as it stands at present to liability founded on torts and holding that in cases of contractual liability Art. 115 would be the appropriate article applicable. The decision under notice gives judicial support to the comments of Mr. Rustomji and there is great force in the observations of Page, J., in the present case that whatever might have been the true scope of the article before Act X of 1899 which introduced the words " non-delivery of or " in the article, there can be no doubt that after the amendment, Articles 30 and 31 apply to all kinds of liability whether contractual or tortious on the part of carriers. If any reason has to be given for allowing the shorter period of one year for suits against a carrier, it is to be found in the judgment of Spencer, J., in his order of reference in *Venkatasubba Rao* v. *The Asiatic S. N. Co.* (2) where the learned Judge observes that the legislature wanted to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands. The very question that arose in this case came up for consideration in the Full Bench case in *Venkatasubba Rao* v. *The Asiatic S. N. Co.* (2) where Mr. Justice Seshagiri Aiyar forcibly supported in his order of reference, the view that the article even as it stands now does not extend to cases of breaches of contract, but the Full Bench held that it extended to all kinds of liability. Mr. Justice Digambar Chatterjee does not refer to this Full Bench decision in *Radha Shyam Basak* v. *Secretary of State for India* (1) but only refers to the older cases prior to the Act of 1899. Even prior to that amendment it was held by Farran, J., in *Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* (3) that the article was comprehensive in its scope as the liability of a carrier could ordinarily be rested both on a contract and a tort ; but the current of authority the other

1. (1916) I L R 44 C 16. 2. (1915) I L R 39 M 1 : 29 M L J 342 (F B). 3. (1895) I L R 19 B 165.

way was too strong with the result that the legislature had to step in and make the matter clear. Again there seems to be no reason as pointed out in *Mulsaddi Lal* v. *B. B. and C. I. Ry. Co.* (4) and by Page, J., in the case under notice to restrict the scope of the article to actions by consignees alone when the language of the article is general in its terms.

HAR BAKSH SINGH *v.* DAL BAHADUR SINGH, I. L. R. 47 All. 186.

In this case there is an interesting discussion as to the limits to the doctrine of incorporation or accretion. That doctrine has come up for discussion with reference to joint family estate, widow's estate and with reference to special rules of succession imposed by custom, statute or grant. Whatever latitude there might be in other cases, so far as statutes and grants are concerned, in the absence of any express provision relating to such incorporation, it is fairly well recognised that there cannot be any process of incorporation by the action of individuals by which the rule can be made applicable to the estate so incorporated. Such a statutory provision has been recently incorporated into the Oudh Estates Act by an amendment of 1910. The Hindu Law recognises the doctrine in the case of widow's estate as well as joint family estate. Similarly custom seems to recognise it in the case of impartible estates. The requisites of an incorporation vary in each of these cases. In the case of joint family the blending of the incomes of self-acquisition and joint family property might lead to that inference. In the case of the widow, the Bengal doctrine apparently is that if she does not show a clear intention to keep acquisitions out of the income of the husband's estate separate, they are presumed to be incorporated, while the view obtaining in Madras is that unless she shows a clear intention to incorporate the presumption is that she keeps them separate. In the case of impartible estate mere blending of the income of the estate with that of any other separate estate cannot, in the slightest degree, give rise to any such inference. For, as pointed out by their Lordships of the Privy Council in *Rani Jagadamba Kumari* v. *Wazir Narain Singh* (1) "the income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that

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1. L R (1922) 50 I A 1.

4. (1920) I L R 42 A 590.

he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

Even apart from incorporation, Mr. Justice Kanhaiya Lal refers to a presumption (though rebuttable) that the same custom that governs the estate also governs property acquired out of it relying upon *Nawab Ibrahim Ali Khan* v. *Nawab Muhammad Ahsan Ullah Khan* (2) and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (3). Both these were cases relating to Muhammadans in whose case, if a custom of special succession relating to ancestral property is established. the same rule should be presumed to govern the other property as well for there is no basis for the distinction between one kind of property and another under that law. The same rule might apply to parties who are governed by purely customary law and in respect of whom there is no statutory presumption that they are governed by Hindu Law. In the case of Hindus, the rule is that they are governed by that law except in so far as custom has been proved to govern. "Where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom." *Ram Nundun Singh* v. *Janki Koer* (4), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (5). In the case of ordinary Hindus, therefore, from the mere fact that a custom governs the descent of a particular estate, it is impossible to presume that it governs the property acquired by him out of the income of the estate. Mr. Justice Kanhaiya Lal notices the difficulty but the explanation that he gives seems to ignore the fact that the income of the property stands on the same footing as any separate property of the man.

BHAGWAN DAS *v.* SURAJ PRASAD, I. L. R. 47 All. 217.

We had a discussion somewhat analogous in the Madras High Court as to rent sales whether the Civil Court could set aside these sales for irregularity but it was never doubted that the Civil Courts could do so when fraud was proved. Here

2. L R (1911) 39 I A 85. 3. L R (1916) 43 I A 269.
4. (1902) I L R 29 C 828 at 858 (P C). 5. (1869) 12 M I A 523, 542.

the question was whether a sale by the Collector in execution of a Civil Court decree could be impeached on the ground of fraud. In the view of the Court that O. 21, R. 92 did not apply to sale by the Collector, there could be no doubt that a suit lay for the purpose.

MUHAMMAD IBRAHIM *v.* ALTAFAN, I. L. R. 47 All. 243.

In this case a curious point of Muhammadan Law as to annulment of marriage on the ground of impotency of the husband arose. Under that Law in such a case the husband is entitled to be given access for a year more and if he fails to consummate marriage even during that period, the marriage is to be annulled. There were somewhat analogous rules under English Law—for instance, at one time, three years' co-habitation was insisted upon before annulment could be ordered and similarly if the Court was not satisfied as to the facts it would suspend the decree in order that further attempts might be made at consummation. These peculiar rules are no longer held binding and annulment has been ordered in recent times after much shorter period of co-habitation and with no further period of probation. The learned Judge thought that the rule was a rule of substantive law and not one merely of evidence. In Muhammadan Law, as in other systems of law, in the guise of a rule of evidence, there is so often to be found a rule of substantive law.

SECRETARY OF STATE FOR INDIA *v.* RAMANUJACHARIAR, I. L. R. 48 Mad. 282 : 47 M. L. J. 780.

This is a very important judgment in that it is the first judgment of its kind in the Madras High Court which lays down that the settlement binds the Government during the period of 30 years and a suit will lie if the Government acts contrary to it. Owing to the somewhat wide language of S. 58, Revenue Recovery Act, there was a vague feeling though there was no express decision to that effect that the Government's action, though improper, could not be the basis of an action in Civil Courts. The dictum of the Privy Council in *Prasad Rao* v. *The Secretary of State for India* (1) helped the conclusion.

THE PRESIDENT, TALUK BOARD, HOSPET *v.* CHANDRAPPA, I. L. R. 48 Mad. 309 : 47 M. L. J. 774.

The question in this case was whether a person ceases to be an Honorary Magistrate the moment he sends in his resignation or only when his resignation is accepted by the Local Government. It was held following the decision in *Sudarsana Rao* v. *Christian Pillai* (2) that he ceases to hold office only when the resignation is accepted. It may be right enough to say that no trust (all public offices are in the nature of trust) can be renounced without the consent of the beneficiaries unless a power of renunciation is given expressly in the deed of trust or by the authority creating the trust. In other words, the right of resignation does not inhere to every office. But where the right of resignation is given, the *raison d'etre* for the rule disappears and the resignation terminates the office unless of course the very deed or authority requires any further act to be done before the resignation takes effect. Though the Statute should prescribe that some further act should happen before the vacancy occurs, such as a declaration by the Council that the office has become vacant, if the declaration is compulsory, the member cannot revoke his resignation or take part in or discharge the duties of his office after the resignation. *The Queen* v. *The Mayor and Town Council of Wigan* (3) and *Pease* v. *Lowden* (4). Directors of companies, for instance, cannot re-

1. (1917) I L R 40 M 886 : 33 M L J 144 (P C).
2. (1925) 45 M L J 798.
3. (1885) 14 Q B 908.
4. (1899) 1 Q B 386.

sign their office without the consent of the Corporation but if the articles authorise resignation, the resignation takes effect independently of acceptance by other directors or by the company. 5 Halsbury 241. As Lindley, L. J. puts it in *Finch* v. *Oake* (1) " there is no law that a resignation that cannot be refused must be accepted before it can take effect. " This point of view is well brought out in Paine on *Elections* by reference to American authority.

BOARD OF REVENUE *v.* SOUTH INDIAN RAILWAY CO., LTD., I. L. R. 48 Mad. 368 : 48 M. L. J. 461.

Though in the abstract, the difference between a lease and a license is very clear, in practice it becomes often difficult to say whether a particular transaction is a lease or a license and the difficulty is enhanced not unoften by loose use of words, such as rent, re-entry, etc. Here the Special Bench had to decide whether the document in question which conferred the privilege of stacking coal on the Municipality of Chidambaram was a lease or merely one granting a license. On a construction of the whole document, their Lordships held that the document conferred only a license and the circumstances that weighed with them were first that it was not competent for the South Indian Railway Company to grant a lease and secondly there was an express clause which said that nothing therein contained should be construed to create a tenancy. One should think as the House of Lords thought in a recent case with respect to contract which wound up with saying that nothing in the document should be construed as giving rise to a contractual liability but that the document should be construed merely as giving rise to a debt of honour, that the clause was conclusive as to its not amounting to a lease though it is generally true that it is not what the parties call a transaction but what the transaction having regard to the terms as a whole in fact is that gives the transaction its appropriate character. In *Glenwood Lumber Co.* v. *Phillips* (2) the Privy Council construed a document purporting to grant a license as really amounting to a lease the chief characteristic of the latter being according to their Lordships a right to exclusive possession.

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1. (1896) 1 Ch. 409 at 415.
2. (1904) A C 405.

MUSSAMAT HIRA BIBI v. RAM HARI LAL, 49 M. L. J. 240 (P. C.).

The decision of the Judicial Committee in this case will, it is hoped, settle a vexed question in the Law of Evidence dealing with the proof of documents *required by law to be attested*. The trend of the recent pronouncements of the Judicial Committee has been more and more towards a rigorous insistence on the observance of the formality of attestation according to law in the case of such documents. As regards documents whose attestation is optional, a party is free now as ever to give such evidence as he pleases. Even where it is compulsory, the earlier view of the Courts in this country was to treat the attestation as a common formality and hold the document to be sufficiently proved, if they were satisfied as to the genuineness of the document, though, no doubt, there were a few cases now and then sounding a stricter note. But the turn towards the stricter view was made when the Privy Council ruled in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1) that the persons signing as witnesses must be present at the execution of the instrument and sign their names after seeing the actual execution of the same [*see* also *Ganga Prasad Singh* v. *Ishri Prasad Singh* (2) and *Padarath* v. *Ram Narain Upadhia* (3)].

The exact scope of S. 70 was, however, by no means clearly laid down. An early case in *Jogendranath* v. *Nitya Charan* (4) decided that the admission of a party during trial will not dispense with the necessity of calling the attesting witnesses, though in that case, on the facts the Court presumed valid attestation. It may be mentioned here that it was also doubted whether the admission of execution mentioned in S. 70 referred only to one made in the course of the trial. [See *Asharfi Lal* v. *Mt. Nannhi* (5); also *Raj Mangal Misir* v. *Mathura Dubain* (6), *Abdul Karim* v. *Salimun* (7) and *Hori Lal* v. *Bhagwan Bakhsh* (8)]. The case in *Jogendra Nath* v. *Nitya Charan* (4) was strongly criticised by Messrs. Woodroffe and Ameer Ali in their book on Evidence as overlooking the situation of S. 70 in the Act and the later decisions of that Court have almost uniformly declined to follow that

1. (1912) I L R 35 M 607 : 23 M L J 321 (P C). 2. (1918) I L R 45 C 748.
3. (1915) I L R 37 A 474. 4. (1903) 7 C W N 384.
5. (1921) I L R 44 A 127. 6. (1915) I L R 38 A 1.
7. (1899) I L R 27 C 190. 8. (1916) 34 I C 281.

decision [*Satish Chandra Mitra* v. *Jogendra Nath* (9) and *Shib Charan* v. *Bepin Behary* (10)]. But some cases have held that unless it is an unqualified admission of execution, *i. e.*, an admission "plain and simple, capable of being construed as an admission of due execution in the presence of the attesting witnesses," the party using the document may have to prove the attestation, and reliance is placed for this qualification on the difference between "execution" and "signature" in Ss. 70 and 69. [*Arjun Chandra* v. *Kailas Chandra* (11)]. The Allahabad High Court also has been of the same view. [See *Asharfi Lal* v. *Mt. Nannhi* (5); *Radhe Shiam* v. *Chunni* (12)]. But in Bombay the decisions have not been quite so uniform and they divide these cases into three classes: (1) Cases where it is apparent on the face of the document that the attestation has not been proper; (2) Cases where the party has been put to proof of attestation of the document; (3) Cases where, on the face of it, the attestation is proper and the pleadings do not raise any issue about it. In the first two cases they hold that the admission of execution does not dispense with the proof of attestation and in the third that it does dispense with such proof as against him. [See *Jagannath Narsingdas* v. *Ravji* (13) and *Dalichand Shivram* v. *Lotu Sakharam* (14)].

In England it seems to be the law that the attesting witness must be called even though the document be one the execution of which is admitted by the party to it. And under the Common Law, before the Common Law Procedure Act, it was so even in the case of a document to the validity of which attestation was not requisite. "The general rule which requires the production of an attesting witness, when the validity of the instrument depends upon its formal attestation is so inexorable that it applies even to a document the execution of which is admitted by the party to it; and that too, though such admission be deliberately made in open Court, or even in a sworn answer to interrogatories delivered by the parties to the case." [Taylor, S. 1843.] In some Acts express provision is made to the effect that a document required by that Act to be attested may be proved by the evidence of a person

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5. (1921) I L R 44 A 127.
9. (1916) I L R 44 C 545.
10. (1922) 27 C W N 144.
11. (1922) 36 C L J 373.
12. (1916) 14 A L J 361.
13. (1922) I L R 47 B 137.
14. (1919) I L R 44 B 405.

who is able to bear witness to the requisite facts without calling the attesting witness or witnesses or any of them.

Their Lordships of the Judicial Committee have now definitely ruled in this case that before the admission of execution can be relied upon, it must be proved to be a document duly attested, thereby inclining to the view of Mr. Das, J. [the High Court judgment is reported in *Musammat Hira Bibi* v. *Ramdhan Lal* (15)] that the rule as to attestation is a rule of law affecting the validity of the instrument and not merely a rule of evidence affecting the proof of the document. The effect of so holding will be even to go farther than the Bombay decisions and to compel a party to prove attestation unless there be a specific admission by the party in the pleadings as to valid attestation. It is to be remembered that in this country when a document fails as a mortgage, it does not even serve to create a charge [*Ram Narain Singh* v. *Adhindra Nath Mukherji* (16)] and possibly also that secondary evidence of execution cannot be given by "presumptive or other available evidence" in the absence of the proof of the handwriting of witnesses. [See *Bobardhan Das* v. *Hari Lal* (17)].

MANAVEDAN TIRUMALPAD *v.* MESSRS. PARRY & CO., 49 M. L. J. 390.

We agree that it is only in cases where there is some incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first; but, to go further and say (in the words of Ramesam, J.) that even where the leases are of the same kind, and the terms of the second are somewhat inconsistent with the first, no surrender of the first need be implied, seems to us to ignore the illustration appended to S. 111 of the Transfer of Property Act itself. After the decision of the Privy Council in *Mahomed* v. *Yeoh* (1) illustrations appended to the sections of a statute must be regarded very much as part of the statute itself and cannot be rejected, except as a last resort, when they are repugnant to the sections.

Of course, where the new lease fails as not being valid, there can be no surrender of the old lease, for, as pointed out

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1. (1917) M W N 162 (P C).

15. (1921) 6 Pat. L J 465.

16. (1916) I L R 44 C 388.

17. (1913) I L R 35 A 564.

in *Jamini Mohan Sarkar* v. *Debendra Narayan Singh* (2), the "new lease" in the illustration to S. 111 must reasonably be construed as a new *valid* lease. On the assumption that the new lease only overlaps the first, his Lordship Justice Ramesam naturally concludes that there is a cancellation of the first only for the period for which it is overlapped by the second. We submit that this is not correct either, for the illustration says that on the lessee accepting a new lease, the old lease is *determined* and this is in accordance with, the English Law [Foa on *Landlord and Tenant,* p. 696, *Crowley* v. *Vitty* (3)].

Baron Parke in *Lyon* v. *Reed* (4) says that "the reason why such acceptance of a new lease operates as a surrender of the first is because the lessee, by accepting the new lease, has been party to an act, the validity of which he is estopped afterwards from disputing.; and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the lease." The power of the lessor therein referred to is not, as Justice Ramesam assumes, the power to put the lessee in possession, but the power to *grant* the new lease, for there cannot be two concurrent tenancies of the same premises. In these cases the implied surrender occurs because the lessor does and the lessee assents to an act which is inconsistent with the continuance of the original lease.

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2. (1922) 71 I C 976. 3. (1852) 7 Ex 319. 4. (1844) 13 M & W 285.

HANMANT GURUNATH *v.* RAMAPPA LAGAMAPPA, I. L. R. 49 Bom. 309.

The main question that arose in this case was whether the alienee from a ward after his attaining majority could avail himself of Art. 44 of the Limitation Act and sue for setting aside an alienation of the property by the minor's guardian when he was an infant, within three years of his attaining majority. The question is one of considerable difficulty and the learned Judges refrained from deciding it and disposed of the case on other grounds which are not easily intelligible. The learned Judges, however, express their inclination against the applicability of the article to suits by alienees from the ward after his attaining majority. Although the terms of the first column of Art. 44 refer to a suit by a ward after attaining majority, it has been held by a Full Bench of the Bombay High Court in *Fakirappa Limanna* v. *Lumanna bin Mahadu* (1), that a person claiming under the ward would be affected by Art. 44 and if no suit is brought within three years of his attaining majority, the person claiming under him will equally be barred. Even this point is not without conflict as will be seen from *Abdul Rahman* v. *Sukhdayal Singh* (2). The reason of the rule in *Fakirappa Limanna* v. *Lumanna bin Mahadu* (1) is to be found stated by the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) that after the lapse of three years under Art. 44, the right to the property is extinguished under S. 28, whether it is of the ward or of those claiming under him. If thus the disability to sue after three years attaches to the persons claiming under the ward it may be argued with some force that an alienee from the ward after attaining majority may be entitled to sue within three years after his attaining majority. It is difficult to believe that if the ward dies shortly after attaining majority his heir cannot sue under Art. 44 within three years after the prescribed date. The question cannot, we think, be easily disposed of by saying that Art. 44 is merely an illustration of Ss. 6 and 7 of the Act relying on the Full Bench decision of *Doraisami Serumadan* v. *Nondisami Saluvan* (4), because whatever may be said of the personal disability of the infant when he is under age, there can be no such personal disability attaching to him after he attains majority to lead to the conclusion that Art. 44 affords

1. (1919) I L R 44 B 742 (F B). 2. (1905) I L R 28 A 30.
3. (1899) I L R 23 M 271 : 10 M L J 29 (P. C.).
4. (1912) I L R 38 M 118 : 25 M L J 405 (F B).

a personal protection to the ward. Further, as pointed out in the arguments in the case under notice, Art. 44 abridges in many cases the period of limitation allowed by S. 6, as for instance when the alienation by the guardian is made a few months before his attaining majority in which case he will be barred under Art. 44 if he does not sue within three years after attaining majority, although he would seem to have a longer period under Ss. 6 and 7 of the Act. We may also point out that the reasons which led to the alienee from the minor not being entitled to the exemption provisions in S. 6 of the Act which makes provision for some classes of representatives based on the rule of *expressio unius*, can have no application to cases falling under Art. 44. These considerations would tend to show that a person claiming under a ward after majority might invoke Art. 44 in his favour.

The other point raised in the case as to whether the alienee from the ward after attaining majority can get a decree for possession against the purchaser from the guardian of the minor under a sale which was not binding on the minor is again not quite clear even though the guardian of the minor is a party plaintiff in the suit. If, as is suggested in one portion of the judgment, all that the alienee purchased was a mere right to sue the former purchaser from the guardian and such an alienation was bad under S. 6 (*e*) of the Transfer of Property Act, it is by no means clear that he can rely on his contract and enforce it even against his alienor by specific performance or otherwise. If the alienation of the right to sue is bad, the contract to sell the right to sue would seem to be equally bad. Cf. *Sri Jagannadha Raju* v. *Sri Raja Prasada Rao* (5), *Annada Mohan Roy* v. *Gour Mohan Mullick* (6) and *Aumanchi Auryaprabhakara Rau* v. *Gummudu Sanyasi* (7) which are cases under the analogous provision of S. 6 (*a*) of the Transfer of Property Act. If this is correct, the only person who could sue the former purchaser from the guardian and recover the property sold would be the ward himself and not his alienee at all. It seems, however, doubtful whether what is sold by the ward after attaining majority in the case under notice is a mere right to sue and not property. Cf. *Venkateswara Aiyar* v. *Raman Nambudri* (8).

5. (1915) I L R 39 M 554 : 28 M L J 650.

6. (1923) 50 I A 239 : 50 C 929 : 45 M L J 617 (P C).

7. (1925) 48 M L J 598.

8. (1916) 3 L W 435.

IMTAZ-UN-NISSA *v.* CHUTHAN LAL, I. L. R. 47 All. 304.

This case in so far as it holds that the objection taken does not come within S. 47 seems to be opposed to the ruling of the Privy Council in *Ramabhadra Naidu* v. *Kadiriyasami Naicker* (1), whether the purchaser is or is not a representative of the decree-holder, the question is obviously one relating to execution—as to what is included in the decree and what could and has been validly sold under the decree. The other point decided, *viz.*, that the application was barred by O. 21, R. 92 seems to be equally open to exception—the objection not being one raising a question of fraud or irregularity in the conduct or publication of the sale.

In re, TURKA HUSSAIN SAHEB, I L R 48 M 385 : 47 M L J 661.

This case points out the impropriety of disposing of criminal appeals on the day of the presentation of the appeal. The observations are very valuable and it is hoped that due attention will be paid to them.

KALYANJI *v.* RAM DEEN LALA, I. L. R. 48 M. 395 : 48 M. L. J. 290.

Appeal against an order under S. 476, Criminal Procedure Code, passed by the Presidency Small Cause Court lies according to this ruling to the High Court and not to the Full Bench of the Small Cause Court. The conclusion is based on two grounds: first, that the Small Cause Court sitting to hear appeals under S. 38, is the same Court as the one disposing of the suit ; secondly, that S. 38 is not a case of appeal at all and the Court hearing it cannot be said to be one to which appeals ordinarily lie. The former ground, though much trotted out once, has become somewhat shaky since the decision of the Privy Council in *Sabitri* v. *Savi* (2), but we think the latter is a sufficient ground for the decision and is also a sound basis for the decision. Neither S. 96, Civil Procedure Code, nor S. 195, Criminal Procedure Code, necessarily connotes the idea that the two Courts should be distinct. The appeal may be from the same Court to the same Court. A

1. (1921) I L R 44 M 485 (P C).
2. (1921) I L R 48 C 481 : 40 M L J 308 (P C).

further question arose in the case as to whether the appeal should be heard by the Appellate Side or the Original. On this point the Bench followed the earlier decision in *Munisamy Mudaliar* v. *Rajaratnam Pillai* (3) which held that the side of the High Court which should hear the petition should be determined by the nature of the application.

APPICHI GOUNDAN *v.* KUTTIYAMMAL, I L R 48 M. 388 : 48 M L J 187.

This decision brings into prominence the quasi-civil nature of the proceedings under S. 488, Criminal Procedure Code and the hardship caused by applying the rules of criminal procedure to such proceedings when the respondent is a lunatic. But in these proceedings non-compliance with the order results in imprisonment of the respondent and, as such. the application of criminal procedure cannot be said to be inappropriate. The remedy is to provide an alternative summary civil procedure for such cases.

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3. (1922) I L R 45 M 928 : 43 M L J 375 (F. B.).

HANMANT SUBBAYA *v.* KRISHNA MANJINATH, I. L. R. 49 Bom. 604.

A widow in possession of her husband's estate alienated a part of it for no justifiable purpose and then made an adoption. The adopted son died some years afterwards and the widow then made a second adoption. The second adopted son sued to set aside the alienation by the widow and the learned Judges have held that he would have a cause of action from the date of his own adoption and that the lapse of 12 years from the date of the first adoption is immaterial. We venture to doubt the correctness of this view. There are no doubt some difficulties in the way of regarding the second adopted son as the "legal representative" of the first adopted son, but it nevertheless seems to us difficult to sustain the conclusion in this case.

Though as early as in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1) the Judicial Committee recognised the validity of an adoption made by a mother on the death of her son and in *Suryanarayana* v. *Venkataramana* (2) the power of the mother to make a second adoption on the death of the first adopted son has also been recognised, it has never been definitely laid down what the principle is, on which the later adopted son divests the mother of the estate which she had taken as heir to her first son. In *Ramaswami Aiyan* v. *Venkataramaiyan* (3) the Privy Council left this question open. In *Rai Jatindra Nath Chaudhuri* v. *Amrita Lal Bagchi* (4) a Bench of the Calcutta High Court held that notwithstanding the doubt suggested in *Ramaswami Aiyan* v. *Venkataramaiyan* (3) the decision in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1) warranted the view that the second adopted son would divest the mother of the estate which she had taken as heir to her first son and the learned Judges justified this on the ground that the act of adoption is the voluntary act of the widow and that its very object is to create an heir to her husband. [*See* also Trevelyan, J. in *Amrito Lall Dutt* v. *Surnomoni Dasi* (5) and *Jamnabai* v. *Raychand Nahalchand* (6), *Ravji Vinayak* v. *Lakshmibai* (7) and *Lakhmi Chand* v. *Gatta Bai* (8). Commenting on this decision, Mr. Sarkar Sastri says that

1. (1876) I L R 1 M 174 (P C).
2. (1906) I L R 29 M 382 : 16 M L J 276 (P C).
3. (1879) I L R 2 M 91 (P C).
4. (1900) 5 C W N 20.
5. (1898) I L R 25 C 662 at 692.
6. (1883) I L R 7 B 225.
7. (1887) I L R 11 B 381 at 395.
8. (1886) I L R 8 A 319.

the case for divesting the mother is even stronger in the case of Mitakshara families, for the second son may be regarded as a co-parcener with his brother by assuming the fictional existence of the second son to date from the moment of the death of the adoptive father. He also supports the decision on the equitable ground that otherwise the adopted son will not even be entitled to claim maintenance during the mother's lifetime, whereas in the other view, the mother will certainly be entitled to maintenance and could even protect herself by any reasonable ante-adoption agreement. Messrs. West and Buhler suggest that in such cases the widow must be understood to be in possession as a kind of 'manager' during the interval between the death of the first son and the adoption of the second. It is difficult to find acceptance for this view at the present day in view of the reasons put forward by Bhashyam Aiyangar, J., in *Sriramulu* v. *Kristamma* (9) which are equally applicable to this stage of the widow's possession. There can be no doubt that the first son took the property as *full* owner and on his death succession has to be traced to him [see *Desai* v. *Desai* (10)]. *Prima facie* the mother being the nearer heir, the second son could not divest her on the assumption that he was fictionally in existence at the date of the first son's death and therefore reliance has to be placed upon the further fiction that he was in existence at the date of his adoptive father's death. But this fiction cannot help to support the view taken by the learned Judges in this case ; for pressed to its logical result it would lead to the conclusion that the right of the second son to question the alienation might have become barred even before he was actually adopted.

The right of the adopted son to question an alienation by his mother is held to date from the moment of his adoption, not upon the fiction of his existence from the moment of his father's death, but upon the ground that the widow's estate held by his mother came to an end on the adoption (*See* Mayne's Hindu Law, S. 197). In this view the estate in virtue of which the alienation was made must be held to have terminated once for all when the widow made the first adoption. The estate which she may subsequently take on the death of the first adopted son is acquired by her in a different character altogether and the termination of that estate by the second adoption cannot pro-

9. (1902) I L R 26 M 143 : 12 M L J 197.

10. (1924) 46 M L J 598 at 601.

perly be regarded as furnishing to the second adopted son a fresh cause of action for impeaching an alienation which the lady made not in her new character (in which case the second adopted son would have a cause of action from the date of his adoption) but in her former character.

Looking at the matter in another way the case may be put thus : The first adopted son could undoubtedly have sued to recover possession from the alienee and if he allowed twelve years to elapse without so doing, the alienee would acquire an absolute title by prescription. If, thereafter, the estate passes to the widow on the first son's death and the widow then makes a second adoption it seems to us impossible to suggest that the alienee's prescriptive title can be disturbed by the second adoption. Can it make any difference in principle if the first adopted son dies before the expiry of twelve years from the date of his adoption or the acquisition of a prescriptive title by the alienee ?

A question may indeed arise whether, if the first adopted son should die within twelve years of the adoption and the mother should succeed to the estate, she could as heiress of her son assert his right to impeach the alienation which she had herself made when in possession as heir to her husband. If she could do so at all, it must only be on the cause of action that had accrued to the adopted son and certainly within the period of limitation from the accrual of that cause of action. If she allows the period of twelve years from the date of the adoption to expire, is it possible to suggest that the second adopted son when he seeks to dispute her alienation can get over the prescriptive title of the alienee ? The case is not one which can be brought within Art. 141 of the Limitation Act and if 144 is the Article applicable, the adverse possession of the defendant had commenced long ago and such possession must be held to be adverse to the 'plaintiff' as well though he may not derive title from the mother or from the first adopted son, because these two undoubtedly represented the estate for the time being and the first adopted son represented it as full owner.

If the theory enunciated by Bhashyam Aiyangar, J., in *Sriramulu* v. *Kristamma* (9) be accepted, some anomalies may be avoided ; because according to his view, neither the first adopted son nor the second adopted son can question the widow's alienation as long as she is alive. But that view has

9. (1902) I L R 26 M 143 : 12 M L J 197.

not been followed in any of the Courts in India [*Vaidyanatha Sastri* v. *Savithri Ammal* (11), *Ramakrishna* v. *Tripurabai* (12), *Amrita Lal Bagchi* v. *Jatindra Nath Chowdhry* (13) and *Sahadeo Singh* v. *Ramnandan Singh* (14)].

A point of some nicety may arise in cases in which the first adopted son may die while yet a minor. Under S. 6, cl. (3) of the Limitation Act the benefit of the extended period of limitation can be availed of even by the legal representative and in the case of successive disabilities time is extended till after the cessation of the last disability [S. 6 (cl. 4)]. If in the case above suggested the interval between the death of the first adopted son and the second adoption could be otherwise disposed of, the second adopted son may be able to get the benefit of S. 6. As to the intervening period, there is the question already mooted whether the widow could maintain a suit to impeach her own alienation. Assuming that she could not, can that be said to be a disability within the meaning of S. 6 of the Limitation Act? If equitable considerations were permissible in the application of the Limitation Act, it may be suggested with considerable force that the period during which the person in possession could not sue to impeach her own alienation should not be calculated against the second adopted son, but seeing that time has already begun to run from the date of the first adoption, the case would seem to fall under the first part of S. 9 and the decisions of the Privy Council would seem to preclude the application of equitable considerations.

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11. (1917) I L R 41 M 75: 33 M L J 387 (F B).
12. (1908) I L R 33 B 88.
13. (1904) I L R 32 C 165.
14. (1907) 4 A L J 354.

PRAN MOHAN DAS *v.* HARI MOHAN DAS, I. L. R. 52 Cal. 425.

The question that arose in this case was whether when a father agreed to give his daughter certain properties on marriage and possession of the properties was given to the daughter on marriage and only an unregistered instrument was executed in her favour, she is entitled to rely on the doctrine of part-performance in a suit in ejectment by the father or his heirs. In England under S. 4 of the Statute of Frauds, a contract made upon consideration of marriage to be enforceable has to be evidenced by some memorandum or note in writing signed by the party to be charged or by some person authorised by him to sign; and the question has arisen whether when a father or other relation agreed to settle property on the daughter in consideration of marriage and possession of the same was given under the agreement, the informality of the contract would be available to the father or the other person. In such cases it has for a long time been held on the application of the rule of part-performance that by reason of the further equities arising by the delivery of possession, the informality of the contract is no longer available. *Surcome v. Pinniger* (1), *Dungannon (Lord)* v. *Smith* (2) and *Ungley* v. *Ungley* (3). With the recognition of the rule of part-performance in this country in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) and the cases following it, it would seem clear that part-performance would be a valid plea in the case under notice. In this connection it may not be out of place to mention that there has been a discussion as to what acts would amount to part-performance taking the case out of the statute and what acts would not amount to such part-performance. It has been held, for instance, that marriage itself is not sufficient part-performance to take the case out of the statute. *Dundas* v. *Dutens* (5) and *Lassence* v. *Tierney* (6). The result will be that if the marriage takes place and the daughter enters by a trespass without possession being given to her under the agreement, the plea of part-performance will not be available to her as her possession is not referable to the agreement. It would be a question whether even in such a case she could rely on the rule in *Walsh* v. *Lonsdale* (7) and treat that as done which ought

1. 3 De G M & G 571.
2. 12 Cl & F 616.
3. L R (1877) 5 Ch D 887.
4. (1914) I L R 42 C 801 : 28 M L J 548 (P C).
5. 1 Ves Jun 196.
6. 1 Mac & G 551.
7. L R (1882) 21 Ch D 9.

to have been done. The rule in *Walsh* v. *Lonsdale* (7) would seem also to require that possession of the property should have been given under the agreement. Cf. *Murgatroyd* v. *Silkstone and Dodsworth Coal and Iron Company, Ex parte Charlesworth* (8). To hold otherwise will, we apprehend, have the effect of making the provisions of the Registration Act and the Transfer of Property Act, etc., regarding the formality of contracts in many cases a dead letter. The doctrine of part-performance itself was not received in England without protest. *See* per Lord Blackburn in *Maddison* v. *Alderson* (9).

SURA LAKSHMIAH CHETTY *v.* KOTHANDARAMA PILLAI, I. L. R. 48 Mad. 605 : 49 M. L. J. 109 (P. C.).

There is no new point of law decided in this case nor for the matter of that, any fresh light thrown on any debated point of law. The case merely reiterates the well-known principle that the English rule as to presumption of advancement in favour of the wife in the case of a purchase in her name out of the funds supplied by the husband does not apply in India. The Appellate Court were doubtless also fully aware of this but on a consideration of the facts they came to the conclusion that the purchase was in pursuance of an ante-nuptial agreement by the husband to settle property on the wife While not saying that an ante-nuptial agreement may not be orally proved in India their Lordships say that it would be unwise to act in a disputed Indian case upon oral evidence that there has been an ante-nuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate oral evidence—a direction as to appreciation of oral evidence, we think, somewhat widely stated and in any case hardly of much use.

Where an ante-nuptial agreement is set up to rebut the presumption of benamee, no doubt, it lies upon the person setting it up to prove it. In spite of the language used in this judgment we do not believe that their Lordships intend to hold that an intention that the property should belong to the wife could not be inferred from circumstances. As early as *Narayana* v. *Krishna and another* (10) we find the Judges observing " probably it was (acquired) with the funds acquired by the father ; but if it be so, the presumption is that he intend-

7. L R (1882) 21 Ch D 9.
8. 65 L J Ch 111.
9. (1883) 8 A C 467.
10. (1884) I L R 8 M 214.

ed that the notes transferred to his wife should become her property, and this presumption would be confirmed if it is found that in the life-time of her husband in the presence of sons jealously watching dispositions of the family wealth she is allowed to deal unchallenged with the property standing in her name." Their Lordships of the Privy Council do indeed refer to the mode of dealing with the property. S. 82 of the Trusts Act which deals in fact with Benamee lays down that only "where property is transferred to one person for consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration." It should not be forgotten that "although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption" in cases where there is no room for such an inference and the notions and sentiments of modern India have considerably changed and it is not infrequent that husbands purchase property in the names of wives to free them from the tender mercies of members of the family or even of their children. Supremely oblivious of the changed conditions of India, Sir John Edge reiterates the old rule without qualification or even an idea that it might require qualification. All these rules require periodical re-examination with reference to altered state of society and like the old rule as to presumption in the case of grants to women, this one also should be carefully qualified and restated.

KELU NAIR *v.* THE SECRETARY OF STATE FOR INDIA, I. L. R. 48 Mad. 580 : 49 M. L. J. 79.

The point that arose in this case was slightly different from that in *The Secretary of State for India* v. *Ramanujachariar* (1). The point of difference is that whereas in the earlier case there was an actual settlement with the particular individual and the Government sought subsequently to raise the assessment, in the case under review, there was no such settlement with the individual and the question broadly was—the Government having notified

1. (1924) I L R 48 M 282: 47 M L J 780.

that lands of such and such a description would be assessed at such and such rates, is it open to them to demand other rates for lands of that description. In this case, the notified rate for kumri lands was 2 annas an acre, but they demanded a rate of 8 annas for the plaintiff's kumri alone. Whether it was open to the Government to do so was the question in the case. It is somewhat difficult to regard the liability to pay the assessment as a result of contract. The position is not similar to that of an ordinary landlord and tenant. The payment of assessment is not the consideration for the permission to occupy the land. The land belongs to the ryotwari proprietor and the Government is entitled to levy assessment, the rates of which have got to be determined by them. The right to determine the rates comes to them by common law and by the same common law it should be inferred that they have got the right to do so by what is called a general settlement and once they fix it they have not got the right to vary the rates during the period for which they fix the rate. In some cases, questions of estoppel might arise as, for instance, when on the faith of the representation improvements are effected. But apart from this, it is difficult to see how there could be a question of contract when the settlement of rates is not a matter of bargain at all but the result of unilateral action on the part of the Government. The true position is, as we have indicated above, Government's settlement notification is the declaration of the proper rate and once the declaration is made, the proper rate is declared once for all and the liability of lands answering to the specified description is only for the revenue so declared and the Government has no right to vary it. The rate fixed by the Government is not liable to be canvassed by Courts (S. 58), but once it is settled, the Government cannot go behind it for 30 years thereafter, the *declared* period of the settlement.

SAYMA BIBI *v.* MADHUSUDAN MOHANTA, I. L. R. 52 Cal. 472.

The learned Judges in this case were obliged by the course of decisions in Calcutta to hold that where the abatement of a suit is set aside by the Court, the order cannot be questioned in an appeal from the ultimate decree in the suit. In coming to this conclusion we venture to think that the learned Judges of the Calcutta High Court have placed a too narrow construction on the expression "affecting the decision of the case" in S. 105 of the Civil Procedure Code by understanding it as limited to orders affecting the decision of the case *on the merits.* In the first place, we find no warrant for reading these words into the section. The decisions of the other High Courts are not uniform in this question; and, in some instances, there has been a conflict of rulings in the same High Court. On the language of the section itself without anything else, it would seem that the error or irregularity in any order which will influence the ultimate decree in the suit can be questioned in an appeal from the decree. The question has mainly arisen in cases where an *ex parte* decree or a judgment dismissing a suit for default is set aside, or an abatement is set aside or a reference to arbitration or an award is set aside and a decision is given on the merits in each one of the cases and an appeal is preferred against such decision. In each one of the instances the prior order will not affect the decision of the suit on its merits, as understood by the Calcutta High Court in *Chintamony Dassi* v. *Raghoonath Sahoo* (1) and *Mussamut Kariman* v. *A. H. Forbes* (2). To illustrate the conflict that exists in the same High Court we would refer to *Gulab Kunwar* v. *Thakur Das* (3), *Tasadduq Husain* v. *Hayat-un-nissa* (4) and *Niddha Lal* v. *The Collector of Bulandshahr* (5) for the restrictive interpretation of those words in S. 105 of the Code and *Nand Ram* v. *Bhopal Singh* (6), *Ram Autar Tewari* v. *Deoki Tewari* (7), *Shah Muhammad Fakhruddin* v. *Rahimullah Shah* (8) and *Rudra Prasad Pande* v. *Mathura Prasad Pande* (9) for their literal and wider interpretation. Coming to the Lahore High Court, we find two conflicting decisions of Division Benches on the point in *Ajudhia Parshad*

1. (1895) I L R 22 C 981.
2. (1905) 8 C L J 308.
3. (1902) I L R 24 A 464.
4. (1903) I L R 25 A 280.
5. (1916) 14 A L J 610.
6. (1912) I L R 34 A 592.
7. (1915) I L R 37 A 456.
8. (1924) I L R 47 A 121.
9. (1925) 23 A L J 656.

v. *Imam-ud-din* (10) and *Sundar Singh* v. *Nighaiya* (11), the later decision not even noticing the former. We must observe that the ground on which some of the decisions are distinguished in the last case as being cases of revision is hardly acceptable, as the ratio of these decisions is that as those orders can be questioned in the appeal from the ultimate decree, there is another remedy open to the aggrieved party and the High Court will not therefore interfere in revision. Again in Bombay the principle of the decision in *Balabai* v. *Ganesh* (12) is not easily reconcilable with *Damodar* v. *Raghunath* (13) and *Chimanbhai* v. *Keshavlal* (14). Even in the Calcutta High Court where the restrictive interpretation of the terms of S. 105 originated in *Chintamony Dassi* v. *Raghoonath Sahoo* (1) the cases which have held that an order setting aside an award can be questioned under that section in the appeal from the decree passed on the merits of the suit cannot be reconciled with the other classes of cases. [Cf. *Ambica Dasia* v. *Nadyar Chand Pal* (15) and *Mothooranath Tewaree* v. *Brindabun Tewaree* (16)]. It is only in the Madras High Court all the decisions are uniform in the view that the terms of the section have to be read literally and without importing words which are not there. [See *Gopala Chetti* v. *Subbier* (17), *Achuthayya* v. *Thimmayya* (18) and *Shaik Aptab Shaha* v. *Moyan* (19)]. It may be mentioned here that the view that an order setting aside an *ex parte* decree or an order setting aside an abatement can be questioned in an appeal from the ultimate decree in the suit will not always result in a reversal of the order as it will oftentimes rest on the judicial discretion of the First Court with which the Appellate Court will not usually interfere. The argument based on the intention of the Legislature apart from the terms of the enactment is often not a very certain guide and loses much of its force in the face of the express provisions of S. 105 which has permitted orders to be questioned in the final appeal from the decree, although there may be no direct right of appeal from them. If it is permissible merely to speculate as to why no appeal is provided for from an order setting aside an *ex parte* decree or an abatement, it is possible to suggest that the Legislature might

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1. (1895) I L R 22 C 981.
10. (1922) 71 I C 587.
11. (1923) I L R 6 L 94.
12. (1902) I L R 27 B 162 at 187, 188.
13. (1902) I L R 26 B 551.
14. (1923) I L R 47 B 721.
15. (1885) I L R 11 C 172.
16. (1870) 14 W R 54.
17. (1903) I L R 26 M 604 : 13 M L J 308.
18. (1908) I L R 31 M 345 : 18 M L J 288.
19. (1916) 5 L W 266.

have contemplated that the trial of the suit should not be hung up for a long time by the pendency of an appeal at an interlocutory stage. Although we are inclined to think that the Madras view best accords with the well-known principles of the construction of statutes, it will be at least satisfactory that there should be no uncertainty in the law on the point in each one of the High Courts.

GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI, I L R 47 All. 459 : 49 M. L. J. 238 (P. C.).

In this case a suit was brought on a mortgage executed by the manager of a joint Hindu family for realisation of the amount by sale of the mortgaged property. The suit was decreed in the first Court but was dismissed on appeal. On appeal to the Privy Council, a point was raised taht a personal decree should have been given on the personal covenant against the manager. Their Lordships say that the decree could not be given without an amendment of the plaint. In a properly drawn up plaint upon the mortgage, there would be a recital about the covenant and a claim for a personal decree for the balance after realising the mortgage security. On such a plaint it is difficult to see why the plaintiff, if found disentitled to the sale of the mortgaged property, should not get a decree on the covenant. In this case no such claim was apparently made. In fact, judging from the arguments before their Lordships, there was for a claim of that sort on the covenant a bar of limitation which had to be got over by reference to an acknowledgment apparently not relied upon in the plaint. In those circumstances obviously an amendment was necessary and their Lordships refused to permit it at such a late stage.

DIP NARAIN RAI *v.* LACHHMAN UPADHIYA, I. L. R. 47 All. 466.

After the preliminary decree for foreclosure in a mortgage suit and before the final decree the mortgagor died and one of his representatives was brought on record as legal representative and the decree was made absolute. The question was whether the decree bound the other representatives. The Court held it did. In somewhat similar circumstances under the old Civil Procedure Code, the Madras High Court held that the decree bound. In the event of the defendant dying, S. 368 of

that Code provided that the plaintiff may make an application to it specifying the name, etc., of the person whom he alleges to be the legal representative and the Court shall enter the name of such representative on the record in place of such defendant. From this, it was inferred in the case above referred to that the person so brought on record sufficiently represented the estate. It must be confessed that the reasoning is far from convincing but since, the Code has been amended and the Court is required to decide under O. 22, R. 5, as to who is the legal representative. In the absence of fraud or collusion, it seems to be clear now at any rate that a person whom the Court takes to be the legal representative would represent the estate and it is for a person who disputes the position to apply to the Court to be recognised as a representative under O. 22, R. 5. Under the old Code, there was a provision analogous to this only in the case of a deceased plaintiff's or appellant's representative but not in the case of a defendant's representative and even in such case the Court had a discretion to stay the suit pending the settlement of any dispute. Now the Court has no such discretion, so far as representation in the suit is concerned ; it has got to decide as to who is the representative. It would not bind the true representative from contesting the point in a regular suit but so far as the parties to such a suit are concerned the decision of the Court is conclusive and the remedy of the true representative is to sue the person who has been recognised by the Court for fruits of the decree if realised by him.

As to execution, we have a similar provision in S. 47, Civil Procedure Code. Here too, the Court had a discretion under the old Code either to determine the question itself or to stay execution till the question was determined by a separate suit. The same principles must govern questions arising in execution. See *Ramaswami Chettiar* v. *Oppilamani Chetti* (1).

There is no similar statutory provision in the case of suits against legal representatives but *Gnanambal Ammal* v. *Veerasami Chetty* (2) seeks to protect *bona fide* creditors obtaining decrees against persons in possession. On that question, however, there is a very considerable conflict of opinion in *Kaliappan Servaikaran* v. *Varadarajulu* (3) and *Padman* v. *Hanwanta* (4).

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1. (1909) I L R 33 M 6 : 19 M L J 671.

2. (1915) 29 M L J 698. 3. (1909) I L R 33 M 75 : 19 M L J 651.

4. (1915) 22 C L J 172 : 29 M L J 507 (P C).

PALANIAPPA *v.* SUBRAMANYA, I. L. R. 48 M. 553 : 48 M. L. J. 419.

This decision is of doubtful authority and does not seem to be consistent with *Muthiah Chettiar* v. *Ladd Govinddoss Krishnadoss* (1) which holds that O. 21, R. 16 is not exhaustive and persons not coming within that rule may yet be entitled to apply under S. 146, Civil Procedure Code, as persons " claiming under," here the transferee. See also *Ankalamma* v. *Chenchayya* (2).

RAVI NANDAN PRASAD *v.* JAGAR NATH SAHU, I L R 47 All 479.

The question in this case was as to whether an auction-purchaser is a person " whose interests are affected by the sale" within the meaning of O. 21, R. 90. The Madras High Court held in *Gopalakrishnayya* v. *Sanjiva Reddi* (3) that he was on the ground that the interests need not be those existing before the sale. That interpretation is undoubtedly somewhat violent. This case recognises that but suggests that the section does not require that the interest should be interest in the property. A person who is prejudicially affected by the sale is a person whose interests are affected by the sale and the auction-purchaser complaining that he was led into the bargain by false or inaccurate representation in the sale proclamation to his cost is such a person. The Patna High Court, on the other hand, in two cases has given expression to the view that the auction-purchaser's interests are not affected by the sale. The injury is a further qualification required and the interpretation suggested by the Allahabad High Court makes the section tautologous. On the interpretation suggested, the first part of the section would read " decree-holders, or injured persons can apply to to set aside the sale on the ground of irregularity provided they are injured by the irregularity complained of." It seems to make also a serious inroad on the doctrine of *caveat emptor* which has hitherto been regarded as the rule applicable to Court sales. Mr. Justice Sulaiman protests it is not but Mr. Justice Walsh's judgment furnishes the best answer to the contrary. It is a pity that the legislature could not pick its words with a little more care.

1. (1921) I L R 44 M 919 : 41 M L J 316.
2. (1917) I L R 41 M 637 : 34 M L J 315.
3. (1919) 38 M L J 228.

SARJU PRASAD *v.* MANGAL SINGH, I L R 47 A. 490.

The question in this case was as to whether the reversioners are permitted to challenge an alienation by the manager of a Hindu family which the junior members have failed to question during their life time but are not proved to have affirmed it. This case holds they can. They rely upon *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1). There the Judges differ as to the grounds of the decision and a further point of distinction is that in that case the co-parceners themselves disaffirmed the alienation and sold the property to a third party. The assumption in the judgment of two of the Judges that the transaction is void seems to be opposed to the decision of the Privy Council in *Hanuman Kamal* v. *Hanuman Mandur* (2) and in subsequent cases that such sales are only voidable. *Subba Goundan* v. *Krishnamachari* (3), *Sankara Variar* v. *Ummer* (4) and *Bhirgu Nath* v. *Narsingh* (5). The decision seems to be opposed to the earlier decision of the same Court in *Jagesar Pande* v. *Deo Dat Pande* (6). It is opposed also to a decision of the Madras High Court in *Thayyil Mammad* v. *Purayil Mammad* (7). There is a judgment of the Privy Council in *Ujagar* v. *Pitam* (8) which sounds in the same sense. The way those cases look at the question is that it is an option and not property; of course if the option is exercised by the person entitled thereto, then it becomes a right or property which the heir would be entitled to inherit. The right to set aside a document or a contract on the ground of fraud though a right of a similar nature has been held to descend to heirs. The option to repudiate an alienation by the widow has been held to descend to the reversioner's heir and it is difficult to see on principle why the co-parcener's right to interdict should stand on a different footing.

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1. (1911) I L R 33 A 783 (F B).
2. (1891) I L R 19 C 123 (P C). 3. (1921) I L R 45 M 449 : 42 M L J 372.
4. (1922) I L R 46 M 40. 5. (1916) I L R 39 A 61.
6. (1923) I L R 45 A 654. 7. (1920) I L R 44 M 140 : 39 M L J 572
8. (1881) I L R 4 A 120 (P C).

GOPALA AIYANGAR *v.* EBRAHIM ROWTHER, I. L. R. 48 Mad. 509 : 49 M. L. J. 606 (F. B.).

This case deals with what we may call one of the subtleties of Election Law. It applies the decision of Kennedy and Darling, JJ. in *Hobbs* v. *Morey* (1) to Municipal election in Madras. What was decided in that case is—once a nomination has been accepted and an election takes place, the candidate that claims to be elected must have the *majority of votes*, otherwise, a fresh election should be ordered. The person that gets the minority of votes is not entitled to be declared elected from the mere fact that the only other candidate was disqualified. He is bound to show that he has the majority of votes. If any voters gave votes with knowledge that the candidate was disqualified, their votes may be disregarded. But if after striking off such votes, there should still remain majority in favour of the disqualified candidate, the only course open is to direct a re-election. If there is only one nomination, the Statute says that no election is necessary. If there is more than one nomination which is accepted, an election results and the candidate can be declared elected only if he gets majority of valid votes. We feel no doubt that the Court was right in directing a re-election. The only doubt one feels is about the question whether the Court has a right to strike off the votes of persons who knowingly voted for a disqualified person. Validity of English Municipal elections depends upon Common Law principles. Here we have a complete set of rules, and, it is very much to be doubted if the Court could add to the grounds for invalidating votes set out in the Act.

JODHA SINGH *v.* GOKARAN DAS PANDE, I. L. R. 47 A. 546.

This was an application of S. 151, Civil Procedure Code, on the lines suggested by the judgment of the Privy Council in *Debi Baksh Singh* v. *Habib Shah* (2). After a preliminary decree for sale the plaintiff applied for order absolute but the application was dismissed, as he was not present when the petition was called on. Subsequently on application to revive the former application, the Court cancelled the order of dismissal and passed a final decree. It was objected that the application was beyond the time prescribed for a review. The Court overruled the objection on the ground that it was passing an order under S. 151 as the Court had no

1. (1904) 1 K B 74. 2. (1913) I L R 35 A 331 : 25 M L J 148 (P C).

option but to pass the final decree under O. 34, R. 5 when an application was made to it in that behalf and the order passed was wholly irregular and the High Court upheld the order of the Lower Court. The rule as to dismissal for default of suits did not apply to the case and even the inherent power of Court to dismiss for default if one exists could not apply to a case where the Court had no option but to pass a final decree. Their Lordships of the Privy Council have recently laid down that the O. 17, R. 2 did not apply to suits after a preliminary decree has been passed. *Lachmi Narain Marwari* v. *Balmakund Marwari* (1). The same reasoning would preclude a dismissal for default of an application of the kind involved in the case. If the procedure adopted was inappropriate, the decision in *Debi Baksh Singh* v. *Habib Shah* (2) was an authority for recalling the order under S. 151.

KANHAIYA SINGH *v.* KUNDAN, I. L. R. 47 All. 561.

With deference we are afraid that here lurks some confusion of thought. The previous suit was brought to recover possession setting aside a sale which was held by the Court to be voidable and a decree had been passed in favour of the plaintiff on condition of his paying a certain amount within six months, in default of which the suit was to stand dismissed. The contract was voidable according to the decision of the Court and the plaintiff had avoided it and the Court had made certain order as to restitution of benefit. How after that, plaintiff could be permitted to sue for recovery of the price as if the sale was still intact, it is difficult to appreciate. The case presents no analogy to either *Mahomed Ibrahim* v. *Sheikh Hamja* (3) where on a suit for redemption having been dismissed on the ground that the mortgage set up was not proved a second suit for ejectment was brought or to *Veeranna Pillai* v. *Muthukumara Asary* (4), where on a suit for sale on a usufructuary mortgage having been dismissed on the ground that the document contained no covenant to pay, a subsequent suit was brought for recovery of possession. In both these cases the conclusion in the first suit was consistent with and led up to the second suit, whereas in the case under

1. L R (1924) 51 I A 321 : 47 M L J 441. (P C).
2. (1913) I L R 35 A 331 : 25 M L J 148 (P C).
3. (1911) I L R 35 B 507.
4. (1903) I L R 27 M 102 : 13 M L J 459.

review the conclusion in the first suit was inconsistent with the claim in the second. There could not be any question of ratification after the events that had happened.

GHUMMA *v.* RAMACHANDRA RAO, I. L. R. 47 All. 619.

Though the way in which the decision of the Privy Council in *Ram Sarup* v. *Bela* (1) is explained in this case is open to exception, the decision itself seems to be unexceptionable. A gift with an immoral condition differs in legal consequences from a gift for an immoral consideration. In the former case the gift is good and only the condition is void. In the latter the gift is bad. In other words, where there is an agreement between the donee and the donor that the former should fulfil an immoral condition, the gift is void and not merely the condition whereas in the case which their Lordships had to consider in *Ram Sarup* v. *Bela* (1) the donees were a woman and her minor children and any such agreement, at any rate with the children, being out of the question, their Lordships held that it was purely a case of gift with a condition and upheld the gift. In the case under review the woman donee was a major and was one of the parties to the conspiracy to procure the gift and it was in the contemplation of both parties that she should continue mistress of the donor. The distinction between the two kinds of cases is clearly brought out in *Thasi Muthukannu* v. *Shanmugavelu Pillai* (2).

INTERNATIONAL BANKING CORPORATION *v.* H. PESTONJI AND CO., I. L. R. 49 Bom. 351.

The necessity or otherwise of having to re-stamp a document by reason of a subsequent alteration of some of its terms although the alteration was made with the consent of all the parties thereto does not seem to have been considered in this country except by the Chief Court of Rangoon in *Tribeni* v. *Sahu* (3), although the law on the subject has been perfectly well settled in England for over a century. See *Bowman* v. *Nichol* (4). The general rule is that when a legally valid document is executed on an appropriate stamp paper, the stamp exhausts itself and when any alteration is subsequently

1. (1883) I L R 6 A 313 (P C). 2. (1905) I L R 28 M 413 : 15 M L J 286.
3. (1918) 50 I C 517. 4. (1794) 5 T R 537.

made although with the consent of parties, this is in effect a new document requiring a fresh stamp. This rule has been enacted in S. 14 of the Indian Stamp Act. This principle has been applied to the cases of bills and notes as in the case under notice. To this rule two exceptions have been recognised in the cases. The first, when the document as originally executed contains a mistake in its terms and does not bring out the original intention of the parties and the alteration is made only to correct the mistake and bring out the original intention. *Kershaw* v. *Cox* (1) and *Byrom* v. *Thompson* (2). The second is where the alteration is made before the bill or note is issued or becomes an available instrument, as in the case where a bill payable to the drawer's order is sent to the drawee for acceptance and he requested a longer time to be granted and an alteration to that effect is made before acceptance [*Kennerly* v. *Nash* (3)] or where an accommodation bill is altered before it gets into the hands of a holder for value. *Downes* v. *Richardson* (4) and *Scholfield* v. *Earl of Londesborough* (5). If however in the former case the bill was drawn to the order of another person as payee and delivered to him and an alteration is afterwards made but before acceptance, the bill would require a fresh stamp, as in this case it was a valid instrument before acceptance and the payee could have maintained an action on the bill against the drawer. *Walton* v. *Hastings* (6). It would seem that the two exceptions mentioned above are not exceptions in the strict sense of the term, as, in the one case it was a question of mere rectification and in the other no valid instrument was executed and issued before the alteration. Although these so-called exceptions are not specifically enumerated in S. 14 of the Indian Stamp Act, we believe that they would none the less be held applicable to this country equally. If the principle is as above stated it would make no difference in the case under notice if the time is taken to be extended under S. 63 of the Indian Contract Act or under S. 62, so long as it was not the original intention of the parties when the document was executed.

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1. (1800) 3 Esp 246.
2. (1839) 11 A & E 31.
3. (1816) 1 Stark 452.
4. (1822) 5 B & Ald 674.
5. (1894) 2 Q B 660.
6. (1815) 4 Camp 223.

PRABHAT CHANDRA BARUA *v.* EMPEROR, I. L. R. 52 Cal. 546.

On the main question decided in this case that a decision of a Judge of the High Court on a reference under S. 66 of the Indian Income-tax Act of 1922 is not a "judgment" within the meaning of cl. 15 of the Letters Patent of the Calcutta High Court and is consequently not appealable, the view of the learned Judges is in accord with that of the Lahore High Court in *Bulaqi Shah* v. *Collector of Lahore* (1) although the basis of the judgment of the Privy Council in *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay* (2) on which both the High Courts found themselves is not quite clear. We are not sure that any different conclusion will be come to even if the definition of "judgment" adopted in *Tuljaram Rao* v. *Alagappa Chettiar* (3) is applied to the case.

On the other point touched in the case that when two learned Judges differ in the decision of a case but are agreed as to whose judgment prevails, in an appeal under cl. 15 of the Letters Patent the correctness of the view as to which is the prevailing judgment is not open for argument, is a matter on which, with all respect to the learned Judges, we are by no means clear. It is difficult to find any distinction between such a case and any other case where the Judges composing the Division Bench are agreed on some points but differ on others in which case on an appeal under the Letters Patent, it has been consistently held that even points agreed on by the learned Judges are open. [See *Upendra Nath Bose* v. *Bindesri Prasad* (4), *Gopeswar* v. *Hem* (5) and *Velji Bhimsey and Co.* v. *Bachoo Bhaidas* (6)]. On the reasoning of these cases we are inclined to think that although the Judges composing the Division Bench agree as to which is the prevailing judgment in a case where they have differed, this point on which they have agreed can be questioned in an appeal under S. 15 of the Letters Patent when the whole matter is open before the Appellate Court.

Coming to the question as to which is the judgment that prevails when two learned Judges differ on a reference under the Income-tax Act, the view of the learned Judges in *Emperor*

1. (1924) I L R 6 L 30. 2. (1923) I L R 47 B 724 : 45 M L J 295 (P C).
3. (1910) I L R 35 M 1 : 21 M L J 1 (F B). 4. (1915) 20 C W N 210.
5. (1920) 31 C L J 447. 6. (1924) I L R 48 B 691.

v. *Probhat Chandra Barua* (7) is, if we say so with respect, the one which is consistent with the provisions of cl. 36 of the Letters Patent and with the current of authority on the matter. As was pointed out by Sir John Edge in *Husaini Begam* v. *The Collector of Muzaffarnagar* (8) the provisions of cl. 36 are applicable in all cases which are not strictly appeals under the Civil Procedure Code to which alone the provision in S. 98 of the Code applies. A Full Bench of five learned Judges in *Bapu* v. *Bapu* (9) has held that cl. 36 of the Letters Patent applies to the case of a revocation of sanction under S. 195 (6) of the Criminal Procedure Code after having held that such a proceeding is not strictly in the nature of an appeal but a proceeding under a special jurisdiction. Very recently after a very elaborate examination of the authorities on this point the Madras High Court has held that even in cases falling under S. 25 of the Provincial Small Cause Courts Act if the Judges composing the Division Bench differ it is the view of the Senior Judge that prevails, though it can hardly be denied that the jurisdiction which the High Court exercises in such cases partakes of an appellate character. The nature of the jurisdiction by the High Court in cases of reference under S. 66 (2) of the Income-tax Act being of a special character as pointed out by the Privy Council in *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay* (2), it can only be that to such a case the provisions of cl. 36 of the Letters Patent apply on the analogy of *Bapu* v. *Bapu* (9) referred to above.

ATMARAM SAKHARAM *v.* VAMAN JANARDHAN, I. L. R. 49 Bom. 388.

The question in this case is whether a donor has a *locus penitentiae* not to complete a gift of immoveable properties after an instrument of gift has been duly signed and attested and delivered to the donee and accepted by him but before the deed is registered. A majority of three learned Judges against two have held that the donor has no longer any right to recall the gift. Although, on principle, there may be much to be said in favour of the view of the dissenting Judges that an intending donor is entitled to resile from his intention to make a gift before it is perfected by the registration of the instru-

2. (1923) I L R 47 B 724: 45 M L J 295 (P C).
7. (1924) I L R 51 C 504. 8. (1889) I L R 11 A 176 at 182.
9. (1912) I L R 39 M 750 : 22 M L J 419 (F B).

ment, the line of distinction is very fine between this case and the class of cases where it has been held that a deed of gift may be presented for registration by the donee and registered notwithstanding the objection of the legal representatives of the donor or the donor himself and that the gift in such a case is a valid gift, as in the latter class of cases all that the donor or his legal representative intends by his objection is that he does not want to perfect the gift. If by objecting to the registration and thereby expressing his intention not to perfect the gift he cannot revoke the gift, or to use a loose expression—we do not see how it can be said that before the document is presented for registration it can be revoked by the donor after the instrument is signed and duly attested and delivered into the hands of the intended donee. It may be that it is open to the highest tribunal to hold that a deed of gift registered notwithstanding the objection of the donor would not make it a valid gift as the objection is nothing more than the expression of the intention not to perfect an imperfect gift. But, on the decisions of the several High Courts, the decision of the majority of the Full Bench in this case seems to be, with all respect, the only consistent view to take.

HAR PRASAD *v.* GULZARI LAL, I. L. R. 47 All. 604.

In this case the point was as to whether a covenant in a lease not to sell a grove when planted precluded a mortgage also. Their Lordships held that it did not. What would have happened if the mortgage resulted in a sale, their Lordships had not to consider.

GAJENDRA SINGH *v.* DURGA KUNWAR, I. L. R. 47 All. 637 (F. B).

The question in this case was as to the application of O. 23, R. 3 to awards on a reference pending suit. The majority hold that that section applies to such an award and that objections to the award such as can be urged in an application under R. 20 of the Schedule could also be urged when application is made under O. 23, R. 3. In this view it is somewhat difficult to understand the object of S. 89, Civil Procedure Code. There was a considerable amount of conflict on the question under the old Code and it is difficult to understand what the object of S. 89 could have been if it was not to settle the conflict and once for all lay down that the rules

contained in the schedule form a comprehensive code as to arbitration and if any case came outside it, there was no remedy. But that does not seem to be the effect of somewhat similar legislation in England. Both the Madras High Court in *Nanjappa* v. *Nanja Rao* (1) and the Bombay High Court in *Pragdas* v. *Girdhardas* (2) have taken the view that the provisions of the old Code as to reference had not that effect. The language of S. 89 might well be confined to references and attempts to enforce references and not held to extend awards at all. Even otherwise there is nothing in the Code or anywhere else to show that awards are illegal unless they satisfy the conditions of the schedule. S. 89 cannot be said to be incapable of yielding the conclusion favourable to the view of the majority. The rules do not provide for cases where not only the subject-matter of the suit but also other differences are intended to be settled as a part of the same arrangement or where the reference concerns not only parties to the suit but also other interested parties—cases which it could not be reasonably considered to have been struck at by the Code. This imperfection is an argument in favour of the view of the majority.

Mr. Justice Walsh refers to an inherent power of the Court to keep parties to their engagement which seems to be a somewhat strong procedure when the Code deals with the situation. In *Moonshee Amir Ali* v. *Maharanee Inderjeet Singh and others* (3) their Lordships of the Privy Council declined to hear an appeal when there was an undertaking by the appellant in the Lower Court for consideration that he would not appeal. But there, there was no complication of a reference and further, it was before the settled procedure of the Code.

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1. (1912) 23 M L J 290. 2. (1901) I L R 26 B 76.
3. (1871) 14 M I A 203.

FARID-UN-NISSA *v.* MUKHTAR AHMAD, I L R 47 All. 703 : 49 M. L. J. 758 (P. C.).

In this case, Lord Sumner summarises the effect of decisions relating to the transfer of property by purdanashin ladies. The plea in the case was one of undue influence by the husband and non-explanation of the contents of the document. Undue influence of the husband was found against ; approval of the draft was found and also reading out of the fair. Nevertheless, as the fair introduced substantial changes with respect to which there was no evidence that the attention of the lady was called to them and full explanation tendered, their Lordships held against the validity of the document. The discrepancy between the draft and the fair was a discovery before their Lordships and had not been referred to or commented on in the Lower Courts.

The rules relating to purdanashin ladies are to be distinguished from the headings, fraud, duress and undue influence which according to his Lordship are quite different matters. These rules are only special development which Indian social usages make necessary to the general rules of English Law which protect persons whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. It is a part of the law relating to personal capacity to make binding transfers or settlements of property of any kind Independent legal advice is not essential. The real point is that the disposition must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. If the settlor's freedom or comprehension can otherwise be established or if the scheme and the substance of the deed clearly originated from her and if that scheme has been substantially carried out and embodied in the deed, failure to explain or want of proof of independent advice would not matter. If the settlor really understands and means to make the transfer, it is not required that some one should have persuaded her to the contrary. The burden of proving her state of mind is on those who set up and rely on the deed. Mere execution by such a person although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the execution. Evidence to establish such comprehension is most obviously to be found in

proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language not known to her, it must be translated and explained. The extent and character of the explanation necessary will depend upon the circumstances. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. If the matter is one not likely to attract attention, her attention should be specially directed to it. If there is a discrepancy between the original scheme laid down by her and the scheme as carried out by the deed, the discrepancy should be clearly pointed out to her and explained unless it must have been obvious even to one in her position. In the absence of such explanation, the question would be whether the explanation if given might have affected her mind in completing the deed. The doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor subsequently that she did not understand what she was doing is obviously not conclusive on the question. The whole question is whether having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If it is, the onus of those relying on the deed is discharged.

In the Matter of Begg Sutherland & Co., Ltd., I. L. R. 47 All. 715.

In this case a registered firm was converted into a company. Section 3 directs that the income-tax is chargeable on the previous year's income. Section 26 says that where any change occurs in the constitution of a firm or where any person has succeeded to any business, etc., the assessment shall be made on the firm as constituted or on the person engaged in the business at the time of the making of the assessment and on language quite similar, the House of Lords in *Wankie Colliery Co.* v. *Inland Revenue Commissioners* (1) has held that the new company it is that is liable to pay the excess profits tax in respect of both the profits of the old firm and the new firm. Section 55 of the Act makes an additional income-tax leviable from the company, firm, etc., known as super-tax. The firm was not liable for super-tax, the

1. (1922) 2 A C 51.

liability being on individual members. The question was whether the company was liable to pay super-tax on that income also. Apparently the argument of the learned Judges is that the income of the firm is not the income of the company or that the company cannot be held liable for something for which the firm was not liable. The point of distinction between the excess profits dealt with by the House of Lords' case and the case in hand is that the section dealt with specifically the excess profits and made the tax leviable from the person in charge of the business. Under S. 55, the profits of the registered firm were not chargeable at all so that there is no question of the tax being assessed at all in respect of them and there is no comprehensive statement that for the purposes of the Act, the income of the firm must be regarded as the income of the successor. The conclusion so that of the learned Judges seems to be right.

RAJA DEVI *v.* MUHAMMAD YAQUB, I. L. R. 47 All. 738.

A contract for sale of a future crop of fruit, this case holds, is a contract with regard to moveable property and as such does not require registration. The question in all such cases is as to whether it is intended to create a present transfer of an interest in immoveable property or it is merely a contract with regard to non-existent moveable property. If it is the former, it would require registration. The former kind of contract has all the infirmities of a mere contract relating to moveable property; the latter has the permanence and irrevocability of a transfer of immoveable property. The test as to whether the contract relates to moveable or immoveable has been the subject of several decisions [*see,* for instance, *Seeni Chettiar* v. *Santhanathan Chettiar* (1), *Gnanamuthu Nadar* v. *Veilukanda Nadathi* (2) and *Sukry Kurdeppa* v. *Goondakull Nagireddi* (3)]. Future crops are non-existent property and when they come into existence, they are moveable according to the definition given in the Registration Act.

RAMPUR GOSHAIN *v.* RAMDHARI BHAGAT, I. L. R. 47 All. 770.

There is a certain amount of conflict first as to whether in suits under S. 92, Civil Procedure Code, alienees can be made parties; secondly, as to whether an adjudication therein

1. (1896) I L R 20 M 58 : 6 M L J 281 (F B).
2. (1923) 19 L W 494.
3. (1871) 6 M H C R 71.

made will bind them; thirdly, as to whether any relief can be given against them.

In *Asain Raghavalu Setty* v. *Pellati Sitamma* (1) Wallis, C. J. was of opinion that they could not be made parties while Seshagiri Aiyar, J. seemed to think that they were proper parties though both of them agreed that no relief could be given against them. On this last question, the Madras High Court has taken a consistent view that no relief, such as possession or declaration of invalidity of alienation, can be granted against them [*Rangayya Naidu* v. *Chinnaswami Aiyar* (2) and *Malkajigunda* v. *Ramaswami Chettiar* (3)] though in *Subramania Aiyar* v. *Venkatachala Vadhyar* (4) it was held that a declaration that the property was trust property could be properly made. In Calcutta, in *S. Raja Chowdhuri* v. *G. Mohun Das Baishnav* (5) a very liberal view of the section was taken as enabling the Court to adjudicate against the validity of alienations, etc., but in *Budh Singh Dudhuria* v. *Niradbaran Roy* (6) this view is dissented from, Mr. Justice Mukherjea going so far as to hold that the alienees were not proper parties at all. In Bombay, in *Collector of Poona* v. *Bai Chanchalbai* (7) it is held that a person having an adverse interest may be a proper party though he cannot be ejected. In Allahabad, the view has been that the alienees are proper parties and that a declaration that the property is trust property and that the alienation is bad may be given but that a decree in ejectment cannot be made [*Ghazaffar Husain* v. *Yawar Husain* (8)] and that view has been accepted in the case under review. That seems also to be the view taken in *Mufti Ali Jafar* v. *Fazal Husain Khan* (9). There is much to commend the view of the Allahabad High Court in that much circuity of action is thereby avoided. After a declaration of invalidity of the alienation what remains in a suit for ejectment is very little and except where limitation comes in the way, it is not very likely that a suit will be found necessary at all to reduce the property into possession.

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1. (1914) 27 M L J 266
2. (1915) 28 M L J 326.
3. (1923) 78 I C 950.
4. (1916) 4 L W 444.
5. (1897) I L R 24 C 418.
6. (1905) 2 C L J 431.
7. (1911) I L R 35 B 470.
8. (1905) I L R 28 A 112.
9. (1922) I L R 44 A 622.

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NOTES OF RECENT CASES.

PRIVY COUNCIL.

7th May.—*Mst. Bhagwani Kunwar & another* v. *Mohan Singh & others.*

Judgment delivered, dismissing the appeal.

7th & 8th May.—*Mst. Farid-un-nissa* v. *Mukhtar Ahmad & another.*

Hearing resumed and concluded ; judgment reserved.

7th & 8th May.—*Jacob* v. *Wills* (Bengal—Appeal No. 120 of 1924).

This, probably the first breach of promise appeal ever heard by the Privy Council, arose out of the action of Mrs. Lucia Jacob (*nee* Streek), a lady of German orgin and widow of a Barrister of Fyzabad and Lucknow, who alleged that, about October, 1915, the respondent, an assistant in the firm of Heilgers & Co., promised to marry her at the conclusion of the war. She was interned by the British Government during the war, and, after her release in August, 1920, she sued the respondent in the High Court, and recovered Rs. 35,000 damages, but her suit was dismissed on appeal on the ground that the engagement had been terminated.

L. de Gruyther, K. C. and *E. B. Raikes* for appellant.

F. T. Barrington Ward, K. C. and *S. Hyam* for respondent.

Judgment reserved.

8th & 11th May.—*Maung Bya & another* v. *Maung Kyi Nyo & others* (L. Burma—Appeal No. 106 of 1924).

The question here is whether, in Burma, a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner, by which the water would otherwise have been drained from the land of the higher owner.

Hon. G. Lawrence, K. C. and *E. F. W. Besley* for appellants.

E. A. Harney, K. C. and *R. W. Leach* for respondents.

The hearing is not concluded.

CORAM : *Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.*

8th, 11th & 12th May.—*Lal Bahadur & others* v. *Ambika Prasad & another* (Oudh—Appeal No. 15 of 1924).

The question here is whether the sale on the 12th September, 1904, by two brothers, Pateswari Din and Ram Din, to the appellants of a 4-anna share in the estate of a Hindu family governed by the Mitakshara Law was binding on the respondents, who are members of the family and grandsons of Ram Din. The Subordinate Judge had answered this question in the affirmative, but the Judicial Commissioners had taken the opposite view.

A. M. Dunne, K. C., S. Hyam and *B. N. Srivastava* for appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for respondents.

Judgment reserved.

12th and 14th May.—*Mata Prasad & another* v. *Nageshwar Sahai & others* (Oudh—Appeal No. 27 of 1924).

The appellants here claim to inherit two estates belonging to Narindra Bahadur, who died on the 18th June, 1905. The respondents' case is that the deceased left a will, dated the 21st October, 1904 (which was held genuine by the Privy Council, see L. R. 41 I. A. 78) authorising his widow to adopt a son.

A. M. Dunne, K. C. and *W. Wallach* for appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for respondents.

The hearing is not concluded.

CORAM : *Lord Sumner, Lord Salvesen and Sir John Edge.*

13th May.—*K. Vijayaratnam & another* v. *M. Sudarsana Rao & others* (Madras—Appeal No. 62 of 1923).

The main questions here are whether the will, dated the 1st October, 1906, of the appellants' father, who died a minor on that date, comes under S. 17 (3) of the Registration Act (III of 1877) and whether the authority to adopt contained in that will is valid.

S. Hyam and *B. N. Srivastava* for appellants.

W. Ingram for respondents.

The hearing is proceeding.

13th May.—*Aguilar* v. *K. Gangananda Singh & others* (Appeal No. 126 of 1922).

Judgment delivered, allowing the appeal.

CORAM : *Lord Atkinson, Lord Shaw and Lord Darling.*

21st May.—*Sri Kanchumati V. S. Chandra Row* v. *Kanchumati Raju & others* (Madras—Appeal No. 92 of 1924).

In this suit by the appellant for the possession of certain properties, the final decision depended upon whether the alleged adoption of Respondent by the junior widow of Kanchumati Subbaya as his son was valid.

W. H. Upjohn, K. C., J. M. Parikh and T. C. K. Kurup for appellant.

L. de Gruyther, K. C. and *K. V. L. Narasimham* for respondents.

Judgment reserved.

CORAM : *Lord Sumner, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.*

21st & 22nd May.—*Monghibai & others* v. *Pragji D. Hariani* (Bombay—Appeal No. 112 of 1923).

This appeal questioned the sane state of mind of Vassonji Madhavji, a wealthy Hindu, who died on the 21st November, 1919, having two days previously made his will while ill in a house of ill-fame in Bombay. The Indian Courts had granted Probate to the respondent.

Sir J. Simon, K. C., L. de Gruyther, K. C., Sir G. Lowndes, K. C. and G. D. McNair for appellants.

F. Luxmoore, K. C. and *E. B. Raikes* for respondents.

Appeal dismissed.

CORAM : *Lord Atkinson, Lord Shaw and Lord Darling.*

21st & 25th May.—*Hira Bibi & others* v. *Ram Hari Lall* (Patna—Appeal No. 6 of 1924).

The question here is as to the validity of a mortgage, dated the 17th August, 1916, which the defendants (appellants) contend is not duly attested as required by the Transfer of Property Act, S. 59; whereas the plaintiffs argue *inter alia* that the decisions of the Privy Council in 39 I. A. 218 and 45 I. A. 94 cover the case.

L. de Gruyther, K. C. and *W. Wallach* for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

Judgment reserved.

22nd and 25th May.—*Burn & Co.* v. *H. H. the Thakur Sahib of Morvi* (Bengal—Appeal No. 134 of 1924).

The Thakur Sahib, who owns the Morvi State Railway, sued the appellant firm of Engineers for damages for (*a*) conversion of 42 wagons or alternatively, (*b*) for breach of contract to deliver the said 42 wagons, and to refund Rs.15,833 deposited with them under the said contract. The High Court had awarded the plaintiff Rs.1,37,739 as damages with interest and costs.

A. M. Dunne, K. C. and *Sir R. Aske* for appellants.

Sir G. Lowndes, K. C. and *T. J. O'Connor* for respondent.

Judgment reserved.

22nd and 25th May.—*Maung Bya* v. *Maung Kyi Neo & others.*

Hearing resumed and concluded ; judgment reserved.

22nd May.—*Sura Lakshmia Chetty & others* v. *Kothandarama Pillay.*

Judgment delivered, allowing the appeal.

25th May.—*Mir Subhan Ali* v. *Imami Begum & others.*

Judgment delivered, dismissing both appeals.

A. de M.

PRIVY COUNCIL.

25th May.—*Mata Prasad and another* v. *Nageshar Sahai and others.*

Hearing resumed and concluded ; judgment reserved.

CORAM : *Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

25th May.—*Skipp* v. *Kelly* (Bangalore).

Lilian Mildred Kelly, a governess, sued T. C. W. Skipp in the District Court, Bangalore, for damages for breach of a contract to marry her, and claimed one and a half lakhs of rupees. She was awarded half a lakh, which, however, was, on appeal, reduced by the Court of the Resident of Mysore to Rs. 15,000. Both parties thereupon obtained certificates under S. 110, Civil Procedure Code, 1908, for appeal to the Privy Council, and the defendant's appeal has already been listed. The plaintiff now petitioned for leave to cross-appeal *in forma pauperis.*

Yule for petitioner.

Petition granted.

CORAM : *Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

25th May.—*Ganesh Narayan Sah Deo* v. *Manik Lal Chunder* (Patna—Appeal No. 129 of 1924).

The appellant (judgment-debtor) attacked as irregular and illegal the sale in execution by the respondents 1 to 5 of his share in purganna Barwe to the 6th Respondent.

Sir G. Lowndes, K. C. and *W. Wallach* for appellant.

A. M. Dunne, K. C. and *T. B. W. Ramsay* for respondents 1 to 5.

Appeal dismissed with costs to both sets of respondents.

CORAM : *Lord Shaw, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

26th May.—*Mst. Nag Kuer* v. *Shan Lal Sahu and others* (Patna—Appeal No. 98 of 1923).

The appeal arose out of a decree for dissolution of a partnership and disputed the propriety of certain detailed

directions for distributing the partnership assets which the plaintiff (appellant) alleges were not warranted by the terms of the preliminary decree of the 15th August, 1916.

A. M. Dunne, K. C. and *W. Wallach* for appellant.

S. Hyam for respondents.

Judgment reserved.

11th June.—*K. Vijayaratnam and another* v. *M. Sudarsana Rao and others.*

Judgment delivered ; appeal allowed.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*R. Ganesh Narain Sahai and another* v. *Maharaja of Chota Nagpur* (Patna—Appeal No. 30 of 1923).

The appellants who were sued by the respondent for recovery of possession of purganna Barwe on the ground that Raja Raghubar Sahai, their father, had been tenant thereof as a jagir for life only, defended the action by claiming that it was an impartible estate of their family from time immemorial.

Sir G. Lowndes, K. C. and *W. Wallach* for appellants.

A. M. Dunne, K. C. and *T. B. W. Ramsay* for respondents.

Appeal dismissed with costs.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*Homeshwar Singh and others* v. *Jugal Kishore Marwari and another* (Patna—Appeal No. 32 of 1924).

These were cross-appeals arising out of the High Court decree for Rs. 200,000, damages for breach of contract, awarded to the respondents, two contractors, who had agreed on the 23rd May, 1915, to fell the trees and make sleepers from the timber in the forest belonging to the appellants' father.

L. de Gruyther, K. C. and *S. Hyam* for appellants.

A. M. Dunne, K. C., K. Brown and *G. D. McNair* for respondents.

Judgment reserved.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*Mst. Allah Jawai and others* v. *Msi. Sat Bhara and others* (Lahore).

The petitioners applied for special leave to appeal against the decree of the Subordinate Judge, Jhang (Nov. 1917) and the High Court, Lahore (17th March, 1924) setting aside a *tamliknama* of the 8th June, 1907, and giving possession of the property comprised therein to the respondents.

W. Wallach for petitioners.

Petition dismissed.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

12th June.—*Bhupendra Narayan Singh* v. *Narapat Singh* (Bengal—Appeal No. 170 of 1924).

The question here is whether the respondent is entitled to *khas* possession of *chowkidari chakran* lands unconditionally or only upon payment of additional rent to the appellants.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

L. de Gruyther, K. C. and *R. H. Hodge* for respondent.

Judgment reserved.

12th June.—*Nowroji R. Wadia* v. *Government of Bombay.*

Judgment delivered ; appeal dismissed.

15th June.—*Jacob* v. *Wills.*

Judgment delivered ; appeal allowed.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

15th, 16th & 18th June.—*Sourendra Mohan Sinha and others* v. *Hari Prasad Sinha and others* (Patna—Appeal No. 136 of 1924).

In this suit for a mortgage decree, the Subordinate Judge, Bhagalpur, made a preliminary decree for sale for Rs. 15 lakhs and a personal decree for Rs. 44,164, while the High Court varied these by passing a decree for about Rs. 4 lakhs, and a personal decree for Rs. 23,181. Both parties have appealed, and the appeals have been consolidated. The plaintiffs contend that the High Court misapplied S. 6 of the Sonthal Parganas

Settlement Regulation III of 1872, as amended by Regulation V of 1893, in calculating interest; and the defendants *inter alia* claim that the whole case is *res judicata* because the plaintiffs' former suit in 1904 on the same mortgage was dismissed (*see* 41 I. A. 197).

L. de Gruyther, K. C. and *S. Hyam* for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

The hearing is proceeding.

CORAM : *Lord Haldane, Lord Wrenbury* and *Lord Blanesburgh.*

16th & 18th June.—*S. Sundara Rajan and others* v. *C. M. Natarajan and others* (Madras—Appeal No. 140 of 1923).

This appeal relates to the construction and validity of the will, dated 27th April, 1897, of C. Ratna Mudaliar, who died in 1904.

A. C. Clauson, K. C. and *K. V. L. Narasimham* for appellants.

W. H. Upjohn, K. C., Sir W. Schwabe, K. C. and *A. M. Talbot* for respondents.

The hearing is proceeding.

18th June.—*Sourendra Mohan Sinha and others* v. *Hari Prasad Sinha and others.*

Hearing concluded ; judgment reserved.

18th June.—*S. Sundara Rajan and others* v. *C. M. Natarajan and others.*

Hearing concluded ; judgment reserved.

18th June.—*Burn & Co., Ltd.* v. *Thakur Sahib of Morvi.*

Judgment delivered ; appeal dismissed.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

18th June.—*Mahabir Prasad Tewari* v. *Jamuna Singh and another* (Patna—Appeal No. 92 of 1923).

This appeal relates to the title to the village of Bhariarpur.

E. B. Raikes for appellant.

B. Dube for respondent.

Judgment reserved.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

18th June.—*Bhupendra Narayan Singh* v. *Madar Buksh Sheikh and others* (Bengal—Appeal No. 63 of 1923).

The appellant, who is the Zemindar of a *putni* tenure, which was sold for arrears of rent on the 15th May, 1914, under the provisions of Bengal Regulation VIII of 1819, appeals against the judgment of the lower Courts, which have held that the notices of sale were not published in strict accordance with sects. 8 and 10 of the above Regulation, and that the sale of the *putni,* in so far as it affects the 1st respondent (now deceased), is invalid and ought to be set aside.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

The respondents were not represented.

The appeal is proceeding.

A. de M.

HIGH COURT.

Venkatasubba Rao and Reilly, JJ. *13th July,* 1925. — *C. R. P. No.* 311 *of* 1924.

Madras Local Boards Act (*XIV of* 1920), *S.* 56 (1) (*h*) *and* (4)—*Calculation of period—How to be made—No meeting held in a month—Wrong ruling of President under sub-sec.* 4—*Effect of.*

The period of three consecutive months referred to in S. 56 (1) (*h*) of the Madras Local Boards Act must be held to date from the day of the meeting in the month, which the member of the Local Board did not attend, though it may be that he attended an earlier meeting of the Board in the same month. For the purposes of cl. (*h*) even a month in which there was actually no meeting of the Board could be taken into calculation.

An erroneous ruling of the President that a member had not vacated his seat and that therefore there was no necessity to report the matter under S. 56 (4) does not in any way affect the statutory disqualification under S. 56 (1) (*h*).

K. S. Champakesa Aiyangar for Petitioner.

O. Thanikachelam Chetty for Respondent.

T. S. V.

Phillips, J.
14*th July*, 1925. } *S. A. No.* 1708 *of* 1922.

Limitation Act, Art. 11-*A—Mortgage by one member of joint Hindu family—Sale in pursuance of mortgage decree—Issue of sale certificate relating to whole property—Obstruction in getting delivery—Petition for removal of obstruction—Dismissal—Effect of—Suit by purchaser to recover mortgagor's share after effecting partition—Limitation—S.* 47, *Civil Procedure Code, if a bar.*

A member of a joint Hindu family mortgaged his share in a property to another, who obtained a decree thereon and had the property sold. Both in the sale proclamation and the sale certificate issued to the purchaser, what was sold was described as the whole property. The purchaser was obstructed in his attempt to obtain delivery and applied for the removal of the obstruction. His petition was dismissed, and, more than a year thereafter, he sued for recovering the mortgagor's share in the property after effecting a partition. *Held*, the relief asked for in the suit was not the same as that asked for in the application for removal of obstruction, and the dismissal of the latter did not affect his right to the mortgagor's share and as he was not bound to have the order set aside, his suit was not barred under Art. 11-A, Limitation Act. 12 L. W. 408 (P. C.) explained ; *held* also, as the Court could not in execution enforce the auction purchaser's right to partition, the suit was not barred under S. 47, Civil Procedure Code. 29 Mad. 294 folld. ; 26 Bom. 146 distd. ; 19 A. L. J. 53 dissented from ; 5 Bom. 25 referred to.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

T. S. V.

Jackson, J.
14th July, 1925. } *C. R. P. No.* 417 *of* 1923.

Indian Contract Act, S. 144—*Contract of guarantee—Two persons named in the body of the document as guarantors—But document executed only by one—Whether a condition of liability unless the other signed may be presumed—Condition to be proved.*

In the case of a contract of guarantee intended to be executed by more than one person, the executant who signs is liable unless he makes it a condition that he is to be liable only if the others also execute it. There is no presumption, merely because the document is worded so as to appear there will be several promissors, that the person actually executing it is not liable. 15 Halsbury, S. 901, p. 469 ; *Norton* v. *Powell*, 4 M. & G. 42 ; *Coyle* v. *Elphick*, 22 W. R. 541 at 543 followed. Ex parte *Harding*, 12 Ch. D. 557 at 566 distinguished.

G. Lakshmanna for Petitioner.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Respondent.

Jackson, J.
15*th July*, 1925. } *C. R. P. No.* 913 *of* 1923.

Court Fees Act, S. 7 (*ii*) *as amended by Madras Act V of* 1922—*Suit for maintenance—Pauper application filed in* 1921 —*Leave granted after the amendment came into force—Suit decreed with costs—Liability of defendant to pay Court fee—Basis of payment—Plaint when deemed to be filed—Civil Procedure Code, O.* 33, *R.* 8.

An application for leave to sue *in forma pauperis* for maintenance was filed in 1921, but leave was granted only in June, 1922, after the Madras Act V of 1922 had come into force. The suit being decreed with costs, and the defendant having become liable to pay the Court fee on the plaint, the question arose whether he was to pay the amount as on a plaint filed in June, 1922, or as on the date when leave to sue was applied for ; *held*, as for purposes of the Limitation Act, the application for leave to sue as a pauper is deemed to be the plaint, so for the purpose of Court fee also the plaint must be deemed to have been filed in 1921 when the application was presented, and

hence the defendant was liable to pay the amount as on that date. O. 33, R. 8, Civil Procedure Code, referred to.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Petitioner.

The Government Pleader for Respondent.

T. S. V.

Venkatasubba Rao and Reilly, JJ. *16th July, 1925.* — *C. M. A. No. 216 of 1922.*

Civil Procedure Code, S. 48 and O. 34, R. 5—Mortgage decree of 1907—Time for payment before 1908—Application for execution returned for obtaining final decree—Application under O. 34, R. 5—Judgment making order absolute, but final decree drafted—Execution application in 1921—If barred.

A mortgage decree was passed in 1907 and the time fixed for payment expired in the same year. When the decree-holder applied for sale in 1913, the same was returned on the ground that no final decree had been passed in the case. An application under O. 34, R. 5 was then put in and in 1917 the Court passed an order in terms making the decree absolute, but the decree that was drafted was one under O. 34, R. 5 and Form 10 of Appendix D. There was an infructuous execution proceeding within three years and in 1921 the mortgagee decree-holder again applied for sale, and then the judgment-debtor objected that as more than 12 years had passed from the date of the original decree, it had become barred under S. 48, Civil Procedure Code. *Held*, as there was on record, rightly or wrongly, a final mortgage decree and the conduct of the parties showed that the final decree it was that was being executed, it must be deemed that that was the decree that was under execution and it was not barred under S. 48, Civil Procedure Code.

S. T. Srinivasagopalachari for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

The Offg. Chief Justice and Viswanatha Sastri, J. *17th July, 1925.* — *O. S. A. No. 27 of 1925.*

Letters Patent (Madras), cl. 15—Order refusing application to strike out pleadings—If a judgment—Appeal—Civil Procedure Code, O. 6, R. 16.

The order of a Judge on the Original Side refusing to strike out a portion of the pleadings alleged to be unnecessary or scandalous does not amount to a judgment within the meaning of cl. 15 of the Letters Patent and is hence not appealable. 3 L. W. 107; 35 Mad. 1 followed.

T. V. Muthukrishna Aiyar and *Mahomed Ibrahim Sahib* for Appellant.

V. S. Govindachar for Respondent.

T. S. V.

Phillips, J.
17th July, 1925. } *S. A. No.* 1701 *of* 1922.

Limitation Act, Art. 142—*Applicability—Suit for possession—Allegation of title and dispossession.*

Where a plaintiff sues for possession alleging that the title was in him, but that the defendants took unlawfully forcible possession from his vendor, Art. 142, Limitation Act, applies. 16 Cal. 473 (P. C.), 17 Cal. 137 (P. C.), 25 M. L. J. 95 (P.C.) followed; 39 Mad. 617 (P. C.), 7 C. L. R. 364 (P. C.), 21 C. W. N. 642 (P. C.), 44 Mad. 883 (P. C.), 39 Bom. 335, 21 L. W. 398 distinguished.

C. Narasimhachariar and *N. Sundaresa Aiyar* for Appellant.

S. Varadachariar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
21st July, 1925. } *C. S. No.* 98 *of* 1922.

Practice—Original Side, High Court—Taxation of costs—Witness resident more than 200 *miles from Court-house—Subpoena—Attendance without formal summons—Travelling expenses.*

Where a witness is resident more than 200 miles from the Court-house, and as such no summons could be issued to him, but at the request of a party he attends Court without a formal summons and gives evidence, his travelling allowances and batta can be allowed as part of the costs in taxation. In such cases parties should be encouraged to bring before the Court the witnesses on whom they rely rather than to take out a commission for their examination. But the costs of taking out

and serving a subpoena on such a witness will not be allowed, as no such subpoena should have been taken out at all.

A. V. Narayanaswami Aiyar for Plaintiff.

P. V. Sudarsana Raju for Defendant.

T. S. V.

Ramesam, J.

22nd July, 1925.

S. A. No. 84 *of* 1924.

Estates Land Act, Ss. 3 (2*e*), 53 (2), 144 *and Sch. A, No.* 15 *—Applicability of Act—Pleas not taken in written statement or in the Courts below—If to be allowed in second appeal—Whole village carved out of larger village—Premia paid—Adjustment towards arrears of rent—Limitation.*

The tenants of a holding sued under S. 112, Estates Land Act, stating there was no arrears of rent and if there were any, an amount paid by them as premium in ignorance of their legal rights should be credited towards the amounts due. The defendant pleaded in second appeal that the Estates Land Act did not apply, as he was himself the kudivaramdar but did not raise it in his written statement or in the Courts below. *Held,* it could not be allowed to be raised for the first time in second appeal. As it also appeared that the suit village was a village carved out of a larger village (the Arni Jagir) it was an estate under S. 3 (2*e*) and the Act applied. Scope of 44 Mad. 677 and 45 Mad. 716 explained. *Held also,* in any event, the attachment sought to be set aside would be valid to the extent of the arrears legally due and tenants after the expiry of the period of six months prescribed by No. 15 of Sch. A of the Act could not ask for an adjustment of the premium paid towards the arrears of rent due.

The Advocate-General and *M. S. Vaidyanatha Aiyar* for Appellant.

T. R. Subramania Aiyar for Respondents.

T. S. V.

Krishnan, J.
13th July, 1925. } *C. R. P. No.* 489 *of* 1923.

Vendor and purchaser—Payment of Government revenue by the vendor after sale—Patta continuing in his name—Suit to recover personally the amount from the buyer, whether lies.

Where the plaintiff who sold certain lands to the defendants and got a mortgage of the same properties for a portion of the purchase money paid the arrears of revenue due to the Government as the patta continued to stand in his name, sued to recover the amount so paid from the defendants personally, *held* that the suit was not maintainable in the Small Cause side inasmuch as the remedy of the plaintiff was only against the land and on the principle of subrogation he could only get a charge over the land which the Government had before such payment.

K. V. Srinivasa Aiyar for Petitioner.

R. Kuppuswami Aiyar for Respondent.

C. A. S.

Phillips, J.
13th July, 1925. } *S. A. No.* 1570 *of* 1922.

Practice and procedure—Second Appeal—Power of the High Court to interfere with the discretion of the Lower Appellate Court in admitting additional Evidence—Misconstruction of document by Lower Appellate Court.

Held distinguishing the Full Bench case in 42 Mad. 737 that it was open to the High Court in second appeal to interfere with the discretion of the Lower Appellate Court in the admission of additional evidence where the Lower Court's judgment is vitiated by misconstruction of a material document already on record.

T. Ramachandra Rao for Appellant.

V. Ramadoss for Respondent.

C. A. S.

Venkatasubba Rao and Reilly, JJ.
14th July, 1925. } *C. M. A. No.* 375 *of* 1923.

Provincial Insolvency Act of 1920, *S.* 53 *Voluntary alienation—Burden of proof that transfer was not in good faith or for valuable consideration—Onus on person alleging the same.*

N R C

Held, that the onus of proving that a transfer was not in good faith and for valuable consideration lies on the person alleging the same under S. 53 of the Provincial Insolvency Act.

B. Somayya for Appellant.

T. Ramachandra Rao for Respondent.

C. A. S.

Phillips, J.
22nd July, 1925. } *S. A. No.* 1660 *of* 1922.

Hindu Law—Reversioners—Dispute between presumptive and remoter reversioners during widow's life-time—Settlement by compromise each set of reversioners taking a share—Widow not asserting her title—Actual reversioner on widow's death suing to recover the properties allotted to the other parties to the compromise—Whether suit maintainable.

One S. died issueless in 1906 leaving him surviving a widow, a divided brother and a predeceased brother's sons also divided. The brother and the nephews both claimed *S's* property and their disputes were settled in 1907 by a compromise whereby the brother took two-thirds and the two nephews together took a third of the property. They were thus in possession and enjoyment of their respective shares till the widow's death in 1914. The brother of *S.* then brought the present suit against the nephews to recover the one-third in-their possession, claiming that he became entitled on the widow's death to the entire estate of *S.*

Held, that the transaction of 1907 was not a mere dealing in *spes successionis* as actual possession of the properties was taken and divided between the parties to the settlement ; and that the plaintiff having been a party to that arrangement was precluded from now setting up his title as actual reversioner. 40 All. 487 (P. C), 35 M. L. J. 459 (P. C.) applied.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Appellants.

Y. Suryanarayana for the Respondents.

Srinivasa Aiyangar, J.
22nd July, 1925. } *T. O. S. No.* 7 *of* 1921 *and* 7 *of* 1922.

Madras High Court Fees Rules, O. 6, R 63—Testamentary suit—Scale of fees to vakil.

In testamentary suits, the fee allowed to a vakil is on the basis of a reasonable fee, under R. 38 of the Pleaders' Fees Rules, as the subject-matter of the claim does not admit of valuation and no claim for a definite amount is put forth in the petition for probate, which is later registered as a plaint.

T. K. Srinivasathathachari for Applicant.

T. S. V.

Srinivasa Aiyangar, J.
22nd July, 1925. } *C. S. No.* 765 *of* 1921.

Madras High Court Fees Rules, O, 6, R. 63—Original Side—Vakils' fees—Suit withdrawn before case opened—Taxed costs of defendant—Scale of—R. 31 *(a) and (b) of Pleaders' Fees Rules.*

A plaintiff withdrew his suit on the Original Side of the High Court on the day of hearing before the case was opened, and it was dismissed with the taxed costs of the defendant. *Held* the case fell under R. 31 *(a)* of the Rules for the remuneration of pleaders and not under sub-clause *(b)*. The full scale of fees ought to be allowed in taxation.

T. K. Srinivasathathachari for Defendant.

T. S. V.

Phillips, J.
23rd July, 1925. } *S. A. No.* 1720 *of* 1922.

Promissory Note—Malabar devaswom—Execution by uralars—If binds devaswom.

A promissory note was executed by the *uralars* of a Malabar *devaswom*, and the recitals stated that the executants as *uralars* were liable to pay and that the amount would be due from the *devaswom*. *Held*, a decree can be given against the funds of the *devaswom*, if the amount was borrowed for necessity. 45 Mad. 703 foll. ; 32 M. L. J. 259 and 33 M. L. J. 631 distd.

The principles of English law as to trustees do not apply to Malabar *uralars*.

B. Sitarama Rao and *K. P. Ramakrishna Aiyar* for Appellant.

K. P. M. Menon for Respondents.

T. S. V.

Ramesam, J.
23rd July, 1925. } *C. R. P. No.* 701 *of* 1923.

Madras Estates Land Act, Ss. 111 *and* 205—*Landholder's application for sale—Dismissal—If revisable by High Court—Sale if can be prevented by payment of person having no interest—Decision of Board of Revenue—Powers of High Court.*

A revision petition lies direct to the High Court against an order of a Revenue Court striking off a landholder's application for sale under S. 111 of the Estates Land Act. The Revenue Court is "subordinate" to the High Court, inasmuch as subsequent proceedings may follow by way of suits under S. 112, and the appeals therefrom lie to the Civil Courts. 42 Mad. 76 and 310 applied.

A person who has no interest in a holding cannot prevent a sale thereof by paying to the collector the arrears due from the defaulter. But where the landholder accepts such payment, it is not open to him to go back on such acceptance and insist on the sale proceeding.

Orders passed in revision by the Board of Revenue under the Estates Land Act are not revisable by the High Court. Where the Board has refused to interfere with the order of the Revenue Court, the High Court also will not interfere in revision against the same, unless there has been a gross miscarriage of justice. 47 Mad. 250 followed.

P. Somasundaram for Petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

PRIVY COUNCIL.

19th June.—*Bhupendra Narayan Singh* v. *Madar Baksh Sheikh and others.* Hearing continued and concluded ; appeal dismissed. [*See* p. 7.]

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

19th June.—*Pramatha Nath Mulia* v. *Burton and others* (Patna —Appeal No. 103 of 1923).

The Respondent (Plaintiff) here claimed the sub-soil rights of mauza Kapsara, but the Appellants, besides denying his title thereto, pleaded that the suit was barred by limitation.

L. de Gruyther, K. C. and *B. Dube* for Appellants.

A. M. Dunne, K. C. and *K. Brown* for Respondents.

Appeal dismissed.

23rd June.—*Sri Kanchumarthi Venkata S. C. Row* v. *Kanchumarthi Raju and others.* Judgment delivered ; appeal dismissed.

23rd June.—*Mst. Hira Bibi and others* v. *Ram Harilal and others.* Judgment delivered ; appeal of first appellant allowed, of the other appellants dismissed. [*See* p. 4.]

29th June.—*Homeshwar Singh and others* v. *Jagal Kishore Marwari and others.* Judgment delivered ; allowing the appeal, and dismissing the cross-appeal.

CORAM : *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Dhanpat Rai and others* v. *Bhai Kahan Singh and others* (Lahore).

In this petition for special leave to appeal, the Petitioners were the Plaintiffs in a suit which they brought in July, 1917, for cancellation of a mortgage deed made on the 31st May, 1899 (and the proceedings consequent thereon) by Lachmandass, their father and grandfather, on the ground that it alienated their ancestral property without legal necessity. They ques-

tioned the application of S. 47 of the Civil Procedure Code, 1908, to the proceedings.

Sir G. Lowndes, K. C. and *G. D. Mc Nair* for Petitioners.

Leave granted.

CORAM : *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Sarju Ram* v. *Oudh Behari Pande and others* (Allahabad).

The Petitioner, who was Defendant in a suit by the Respondents of an 8-anna share in village Bhatrindwa, which he claimed to have purchased *bona fide* and for value from the usufructuary mortgagee thereof, now applied for special leave to appeal. The Respondents alleged that the property was ancestral property and was sold without legal necessity, through undue influence, etc., and that the Petitioner had previous knowledge of these blots on the title.

W. Wallach for Petitioners.

Petition dismissed.

CORAM : *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Bansilal Abirchand* v. *Ghulam Mahbub Khan and another* (Hyderabad, Deccan—Appeal No. 131 of 1924).

The Appellant sued the Respondent before the Civil Judge, Secunderabad, for Rs.58,000, money lent and secured by three bonds, dated 1891 and 1894, alleged to have been made by the late Mohd. Allauddin, deceased (grandfather of Respondent 1); for which the late Sir Asnam Jah (Prime Minister of Hyderabad, and father of Respondent 2) was surety. Exemption from the Limitation Act, 1898, is claimed by virtue of sect. 13, but the respondents plead that a British Court, like that of the Cantonment at Secunderabad, had no jurisdiction to hear the case, and that the proper *forum* was the State of Hyderabad.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Appellant.

L. de Gruyther, K. C. and *B. Dube* for Respondents.

Judgment reserved.

30th June.—*Maung Bya and another* v. *Maung Kyi Neo*. Judgment delivered; appeal allowed, [*See* p. 1—2].

CORAM : *Lord Finlay, Sir John Edge, Mr. Ameer Ali* and *Mr. Justice Duff.*

30th June.—*Ma Chit Su* v. *National Bank of India, Ltd. and another* (Lower Burma—Appeal No. 123 of 1924).

This appeal arises out of an action by the Respondent Bank for specific performance (which both the Lower Courts have decreed) of a contract for the sale of premises No. 3, Phayre Street, and No. 62, 37th Street, at Rangoon.

G. Lawrence, K. C. and *E. F. W. Besley* for Appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondents.

Judgment reserved.

A. de M.

HIGH COURT.

Phillips and Ramesam, JJ. *22nd July,* 1925. } *S. A. No.* 1171 *of* 1922.

Inam—Enfranchisement—Karnam service—Adverse possession—Effect of enfranchisement.

A grantee of *karnam* service inam lands after enfranchisement sued a person in possession for recovery of the same. The latter set up title by adverse possession, and it was contended for plaintiff that enfranchisement gave him a fresh title to sue and that the possession prior to enfranchisement did not count. *Held*, overruling the contention, that the ordinary 12 years' rule applied to the case and enfranchisement did not nullify the effect of the defendant's possession prior to it. 30 Mad. 245, 28 C.W.N. 66 folld. ; 46 M.L.J. 482 dissented from ; 48 M.L.J. 470 distd.

This decision was followed by *Jackson*, J. in S. A. No. 260 of 1923 decided on 30th July, 1925.

Y. Suryanarayana for appellant.

B. Jagannatha Doss for respondent.

T. S. V.

Devadoss and Waller, JJ. *24th July,* 1925. } *C. M. S. A. No.* 55 *of* 1925.

Limitation Act, Arts. 180, 181—*Auction sale—Decree-holder purchaser—Application for delivery within* 3 *years of confir-*

mation of sale—Order for delivery—Subsequent application for delivery within 3 years of order—If barred.

An application for delivery of property by a decree-holder purchaser made more than three years after confirmation of the sale but within three years from the date of a prior order of Court directing delivery falls under Art. 180 and not under Art. 181 of the Limitation Act and is therefore barred. Opinion of *Oldfield*, J. in 43 I. C. 155 followed; view of *Abdur Rahim*, J. dissented from.

K. Kameswara Rao for appellant.

P. Satyanarayana for *P. Somasundaram* for respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
24th July, 1925. } *A. S. No.* 88 *of* 1922.

Civil Procedure Code, S. 92—Interest— Mosque —Residence near—Effect.

In the case of a Mahomedan mosque, mere residence near it is not sufficient interest within the meaning of S. 92, Civil Procedure Code.

Per Madhavan Nair, J.—Residence in or near the locality must be considered only as a fact from which an inference may be drawn as to the existence of an interest within the meaning of S. 92 9 L. W. 1 distd. ; 42 Mad. 360 considered and applied ; 47 Mad. 884 (P. C.) refd. to.

P. R. Ganapathi Aiyar for appellants.

S. Varadachariar and *M. S. Ramanuja Aiyangar* for respondents.

T. S. V.

Odgers and Madhavan Nair, JJ.
24th July, 1925. } *A. S. No.* 96 *of* 1922.

Mortgage—Agreement to make an endorsement of discharge on prior promissory note—Mortgagee assigning pro-note for consideration to stranger—Failure of consideration—Merger—Principle when applies.

The defendant executed a hypothecation bond to the plaintiff directing the latter to make an endorsement of discharge on a promissory note executed to him before. Instead of so doing the plaintiff assigned the promissory note to one V. for consideration. In a suit by plaintiff on the hypothecation bond, ***held*** there was a failure of consideration as soon as the pro-note was assigned to V. and not when V. brought a suit on the note, got a decree and realised the amount from the defendant.

Held also, the doctrine of merger that a smaller security would *ipso facto* be extinguished when a greater security is taken would not apply to a case where the securities are in different hands.

K. V. Krishnaswami Aiyar and *K. G. Srinivasa Aiyar* for Appellants.

K. Rajah Aiyar and *R. Purushothama Aiyangar* for Respondent.

T. S. V.

Phillips and Ramesam, JJ.
24th July, 1925. } *S. A. No.* 1704 *of* 1923.

Hindu Law—Partition—Rights of alienee from co-parcener—Equities to be pleaded—Decision when res judicata.

A suit for general partition by a stranger who has purchased a co-parcener's interest in some joint family properties should be filed before a non-alienating co-parcener brings a suit for partial partition. If in a suit for partial partition, the stranger purchaser does not set up the equities in his favour or his equitable rights are disallowed, that decision is final and conclusive as between the parties and will operate as ***res judicata*** in a subsequent suit filed by him for general partition. But such later suit is maintainable in law. Case-law referred to.

K. Sankara Sastri for Appellants.

N. Chandrasekhara Aiyar for Respondent.

T. S. V.

NRC

Phillips, J.
27th July, 1925. } *S. A. No.* 1798 *of* 1922.

Mortgage—Redemption—Time fixed for payment—On default mortgagee and his heirs to enjoy—Rule of strict construction.

A mortgage document executed in 1844 contained a clause that after 30 years in default of payment of the mortgage amount the mortgagee was to have the *kuduthala* changed in his name, he and his heirs were to enjoy the property from generation to generation, and the mortgagor and his representatives were not to have any right or interest thereafter. The amount was not paid within the stipulated time and subsequently a redemption suit was filed. *Held,* the strict construction of the contract ought to be given effect to, and the suit for redemption could not be maintained. 13 M. I A. 560 and 1 Mad. 1 followed.

C. V. Anantakrishna Aiyar and *K. Y. Adiga* for Appellants.

B. Sitarama Rao and *K. Sundara Rao* for Respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
27th July, 1925. } *L. P. A. No.* 4 *of* 1924.

Civil Procedure Code, S. 11—*Suit in ejectment alleging title as owner—Dismissal on oath—Subsequent suit for a share conceding share to defendant—If barred.*

A suit in ejectment by plaintiff's father against his brother was dismissed on the latter taking an oath that the properties were family properties. Subsequently in a suit brought by the sister's daughter of the defendant for her share under the Mahomedan Law, it was found that the properties belonged exclusively to the plaintiff's father and not to the whole family. The plaintiffs thereafter sued the defendant for recovering their share in the properties alleging the real ownership to be in themselves but conceding a share to the defendant in pursuance of his oath in the first suit. *Held,* the suit though brought for recovery of a share was not a suit for partition as between co-owners but one based on ownership and consequently it was barred by *res judicata.* 46 Mad. 135 folld. *Held* also, the dismissal of the suit filed by the sister's daughter did not bar the claim of other sisters who were co-defendants in that suit.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Appellants.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondents.

T. S. V.

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The Officiating Chief Justice and Viswanatha Sastri, J. *27th July*, 1925.	*O. S. A. No.* 33 *of* 1925.

Letters Patent, cl. 15—*Order of a Judge on the Original Side rejecting an application for review—Whether "judgment"—No appeal lies.*

The order of a Judge sitting on the Original Side rejecting an application for review is not a judgment within the meaning of cl. 15 of the Letters Patent and no appeal lies therefrom. Nor is it appealable under the Civil Procedure Code.

K. Rajah Aiyar for Appellant.

K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for Respondents.

C. A. S.

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Jackson, J. *27th July*, 1925.	*C. R. P. No.* 872 *of* 1923.

Madras District Municipalities Act, Ss. 80, 92 *and* 354—*Collection by a Municipal Council of a sum as profession tax—Claim by the Council to retain the same as Company tax, after objection by the Company—Strict compliance with the statute incorporating public bodies necessary—Non-compliance with Ss.* 80 *and* 92—*Company entitled to refund—Suit for the same maintainable.*

Where a Municipal Council collected a sum of money from a Company as "profession tax" and on objection taken by the Company claimed to retain a portion of it as "Company tax" under the provisions of Madras Act V of 1920, *Held*, that Municipalities and public bodies should strictly comply with the provisions of the Act to which they owe their existence that there being no compliance with Ss. 80 and 92 of the Act there being no second publication as required by S. 80 the levy and retention were *ultra vires* and the jurisdiction of Civil Court to enquire into the legality of the levy was not ousted under the provisions of S. 354 of the Act. *Held* further,

that the retention as Company tax of amount originally collected as profession tax is also illegal. Suit by the Company for refund was consequently decreed.

T. Ramachandra Rao for Petitioner.

Y. Suryanarayana for Respondent.

C. A. S.

Venkatasubba Rao and Reilly, JJ. *30th July*, 1925. } *C. M. S. A. No.* 108 *of* 1923.

Civil Procedure Code, S. 146 *and O.* 21, *R.* 46—*Attachment before judgment of debt due to defendant—Decree obtained by defendant against his debtor—Recording of satisfaction—Rights of attaching creditor.*

L. to whom money was owed by R. was sued by a creditor X. who obtained an attachment before judgment of the debt due by R. Subsequent to the decree in the suit, L. sued R. for the money due, obtained a decree and reported satisfaction to the Court. X. then applied to execute his decree and the question was as to the effect of his failure to attach the decree obtained by L. against R. *Held*, per *Venkatasubba Rao, J.* (1) the attachment before judgment of the debt due to L. by R. fastened itself to the decree without any further act on the part of the attaching creditor. The debt having matured into and merged in a decree, the attachment gets transferred to the decree. 17 All. 210 (P. C.) referred. (2) X. can also invoke the aid of S. 146, Civil Procedure Code, and as a person claiming under L, can execute his decree. S. 146 should be construed liberally. 44 Mad. 919 referred to ; 51 Cal. 703 distinguished ; 1922 All. 98 dissented from. *Held*, per *Reilly, J.* (*contra*) (1) the attachment of the debt does not automatically transfer itself into an attachment of the decree and the execution petition must be amended by adding a prayer for the attachment of the decree, and (2) the mere recording of satisfaction was not a bar to attaching the decree in execution, where the act is done fraudulently and in the absence of the parties really affected by it. 6 Bom. 148 ; 27 M. L. J. 172 ; 14 M. I. A. 40 referred to Effect of attachment explained.

B. Sitarama Rao and *L. V. Krishnaswami Aiyar* for Appellant.

R. Ganapathy Aiyar for *K. Rajah Aiyar* for Respondent.

T. S. V.

Phillips, J.
30th July, 1925. } S. *A. No.* 855 *of* 1922.

Limitation Act, S. 14—*Plaint filed in wrong Court—Order directing return of plaint—Plaint returned much later—Period of deduction—Computation—Proceedings when end—Civil Procedure Code*, O. 7, *R.* 10.

A suit for rent was originally filed in a Small Cause Court, but returned to be presented to a Revenue or Civil Court according as the lands formed an "estate" within the meaning of the Madras Estates Land Act or not. It was duly presented to the Civil Court and, after the lapse of a long time, the Court of Appeal decided that the Civil Court had no jurisdiction and directed the plaint to be returned for presentation to a Revenue Court. The plaint was actually returned about a month after the date of the appellate judgment. The question arose whether in calculating the period of exclusion under S. 14, the period between the date of appellate judgment and the actual return of the plaint should be included. *Held*, the proceedings can be said to have ended within the meaning of Explanation I only when the plaint is actually returned after complying with the provisions of O. 7, R. 10 and hence the period should be excluded. 3 M. L. J. 190 dissented from ; 7 M. L. J. 261 ; 22 Bom. L. R. 387 and (1887) A. W. N. 323 followed.

K. Bashyam Aiyangar and *A. Srinivasa Aiyangar* for Appellants.

A. Krishnaswamy Aiyar, M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondents.

T. S. V.

Phillips and Ramesam, JJ.
31*st July*, 1925. } S. *A. No.* 1076 *of* 1922.

Easements Act, S. 7, *Illns.* (*a*) *and* (*i*)—*Natural right—Right of owner of upper land to have surface-water flow down naturally on lower land—Whether owner of lower land has a right to protect himself by raising bunds.*

On account of the conflict between 29 Madras 539 and (1910) M. W. N. 545 on the one hand, and 38 Madras 149 and 28 M. L. J. 98 on the other, on the question whether the owner of a lower land has a right to prevent the surface water falling on an upper land from flowing naturally on to the lower

land by raising bunds or otherwise, their Lordships referred the above case to a Full Bench for decision.

V. Suryanarayana for Appellant.

B. Satyanarayana for Respondent.

Jackson, J.
31*st July*, 1925. } *S. A. No.* 18 *of* 1923.

Contract—Sale of goods—Performance of—Option to keep contract open—Exercise of—Estoppel.

A person entered into four different contracts with another to supply bales of yarn as and when he got them from the mills. Some bales were supplied and while another supply was being made, the buyer refused to take delivery on the ground of delay and also intimated that he would not accept the remaining bales either. The seller replied that he would keep the buyer bound by his contract, brought a suit for damages for non-acceptance, and again reiterated in the plaint that he would deliver the balance of the goods afterwards. The buyer stated in the written statement that he had already cancelled the contracts. The suit terminated in an award in favour of the seller. Subsequently, the buyer sued the seller for damages for not supplying the remainder of the goods. *Held*, (1) it was open to the promisee to keep the contracts open and subsisting and wait till the time for performance arrived or to treat the repudiation as a breach. L. R. 9 C. P. 208 followed ; (2) the seller by bringing his suit exercised such an option to repudiate notwithstanding his statement in the plaint that he would perform the remainder of the contract ; (3) even if the contracts were kept open, the buyer was estopped from contending that, as he had himself not accepted in his written statement the election by the seller (1919) 1 K. B. 78 followed ; and (4) as the buyer had intimated that he would not be bound by the contract, the seller was no longer liable to perform the contract. 7 Halsbury, p. 423, para 865 followed.

C. V. Anantakrishna Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

T. S. V.

Jackson, J.
31*st July*, 1925. } *S. A. No.* 288 *of* 1923.

Hindu Law—Widow—Funeral expenses—Who to meet—Maintenance holder.

The funeral expenses of a deceased co-parcener's wife should be met out of the estate which was liable for her maintenance. So a divided co-parcener, though nearer in degree to the husband of the deceased woman, is entitled to claim contribution for money spent by him in performing her funeral ceremonies from an undivided co-parcener related to her husband only in a remote degree.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

T. S. V.

Phillips, J.
3rd August, 1925. } *S. A. No.* 1417 *of* 1923.

Aliyasanthana Law—Maintenance—Claim for—Separate maintenance when allowed—Quarrels among members—Inconvenience of joint mess—If grounds for—Equal share to all members including Ejaman—Propriety of.

In an Aliyasanthana family, a claim for separate maintenance cannot be sustained on the mere ground that the members were not getting on well with each other and that a joint mess was extremely inconvenient. 36 Mad. 203, 591, 593 and 42 Mad. 686 referred to.

In allotting maintenance among the members of such a family, an equal share to all members including the *ejaman* is not a proper mode of distribution.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondents.

T. S. V.

Phillips, J.
5th August, 1925. } *S. A. No.* 649 *of* 1924.

Contract—Sale of goods—Money paid as advance—If a deposit by way of security—Test—Intention of parties—Breach of contract—Forfeiture.

Where in a contract for sale of goods, the vendee deposits a sum of money with the vendor as advance and on a breach of contract occurring, the vendor claims a forfeiture of the amount, *held*, he would be entitled to do so, if the money was given as a deposit by way of security. The question must be decided by ascertaining the intention of the parties from all the

circumstances of the case. 24 C. W. N. 40 followed; 19 All. 429 ; 38 Mad. 178 distinguished.

P. Venkatramana Rao for Appellant.

B. Somayya for Respondent.

T. S. V.

Phillips, J.
6th August, 1925. } *S. A. No.* 109 *of* 1923.

Hindu Law—Joint family—Guardianship—Father relinquishing all properties in favour of son—If can delegate powers of guardianship—Alienation by mother—If binding.

In a joint family consisting of a father and son, the father released all his rights in the family properties in favour of his minor son, and the latter was living along with his mother and father in the family house. The mother, purporting to act as guardian of the minor, mortgaged certain properties for purposes binding on the minor. On a question arising, whether during the life-time of the father and while he was living in the family, the mother could act as guardian, *held*, that she could do so. The dictum of *Lord Parker* in 38 Mad. 807 at 819 that guardianship being of the nature of a sacred trust, the father could not substitute another in his place is only *obiter* and cannot be said to be of universal application, irrespective of surrounding circumstances.

T. S. Viswanatha Aiyar for *K. Sundara Rao* and *M. C. Sridharan* for Appellant.

K. P. Sarvothama Rao for Respondent.

T. S. V.

Jackson, J.
6th August, 1925. } *Cr. Rev. Case No.* 779 *of* 1924.

Penal Code, Ss 403, 405*—Applicability—Immoveable property.*

There cannot be any criminal breach of trust or criminal misappropriation with regard to immoveable property. 6 Bom. H. C. 33 ; 23 Cal. 372 referred to.

V. L. Ethiraj and *M. C. Sridharan* for Petitioner.

The Public Prosecutor and *E. V. Sundara Reddy* for Respondents.

T. S. V.

Phillips, J.
7th August, 1925. } S. A. No. 12 *of* 1923.

Inam—Resumption—Grant for personal services—Rights of Zemindar against inamdar—Right to eject—Burden of proof.

In the case of a post-settlement *inam* granted in consideration of the grantee rendering personal services to the Zemindar, the grant is one for service to be rendered in lieu of wages and the Zemindar is entitled to put an end to the service and resume the *inam* at any time. (1911) 2 M. W. N. 406; (1914) M. W. N. 179 followed.

Where the Zemindar resumes an *inam* he is not ordinarily entitled to eject the *inamdar* but can only sue him for rent. There is no presumption that the grantee did not own the *kudivaram* on the date of the grant, and the onus of proving the right to eject is on the Zemindar. 18 M. L. T. 142 followed.

B. Somayya for Appellant.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondent.

T. S. V.

Ramesam and Jackson, JJ.
10th August, 1925. } *A. S. No.* 1 *of* 1923.

Specific Relief Act, S. 42—Rival trustees—Suit for declaration of right to joint possession—Property attached under S. 146, Criminal Procedure Code—Injunction if a necessary relief.

The trustee of a temple sued a co-trustee for a declaration of his right to joint possession. The properties had been attached by a magistrate under S. 146, Criminal Procedure Code, but the defendant still pleaded the suit was not maintainable in the absence of a prayer for an injunction restraining the defendant from interfering with the plaintiff's right to joint possession. *Held*, the suit as framed was maintainable. 29 Bom. 19 at 29 referred to; 43 Bom. 507 at 516 (P. C.) followed.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

N R C

Jackson, J.
11th August, 1925. } *S. A. No.* 394 *of* 1923.

Provincial Insolvency Act (V of 1920), *S.* 20—*Suit for maintenance—Charge claimed—Defendant becoming insolvent pending suit—Effect of—Charge if can be claimed.*

The plaintiff sued for maintenance out of joint family properties in the hands of her husband and claimed a charge on some of them. Pending the suit, the husband became insolvent and the Official Receiver who was impleaded claimed that no charge could be given on the properties in his hands as he had a preferential right under the law on behalf of the general body of creditors. *Held,* (1) S. 28 did not give any such right ; and (2) on the analogy of S. 52, T. P. Act, the suit having been filed prior to insolvency, a charge could be declared as prayed for.

The Advocate-General (T. R. Venkatrama Sastri) for Appellant.

B. Somayya for Respondent.

T. S. V.

Phillips, J.
12th August, 1925. } *S. A. No.* 831 *of* 1924.

Madras Estates Land Act, S. 26 (1)—*Bringing waste land into cultivation—Meaning of—Permanent lease by temple trustee—Validity of—Suit for recovery of possession—Limitation Act, Arts.* 134, 144—*Cause of action.*

The trustee of a temple sued his tenant for the fixing of a fair and proper rent and claimed arrears on a certain basis. The latter pleaded that he was in possession under a permanent *cowle* granted by a prior trustee and that he was liable to pay only the amount fixed in the *cowle.* The lands were originally *ryoti,* but owing to disrepair of irrigation facilities had fallen into a state of waste at the time of the *cowle* and the tenant pleaded the lease was binding under S. 26 (1) of the Estates Land Act. He further pleaded that the lease being a permanent one by a temple trustee was void *ab initio* and a suit for possession was barred under Arts. 134 and 144 of the Limitation Act.

Held, (1) S. 26 (1) of the Estates Land Act cannot apply to lands which were in cultivation at a previous period but which had since fallen into a condition of waste ; (2) a suit for posses-

sion would not be barred under Art. 134, Limitation Act, as the temple was an institution and the trustee only its manager and not a person in whom the properties vested within the meaning of Art. 134. 44 Mad. 831 (P. C.) relied on ; and (3) each succeeding trustee had a fresh cause of action to sue, limitation commencing afresh with each trustee. 13 Mad. 277 ; 18 Mad. 266 followed ; 1 Patna 475 dissented from ; 37 Cal. 885 (P. C.) distinguished.

T. L. Venkatrama Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V

Jackson, J. }
12th August, 1925. } *C. M. P. No.* 1353 *of* 1925.

Civil Procedure Code, O. 33, *R.* 1—*Suit for maintenance—Decree in part—Deposit of amount in Court—Appeal for amount disallowed* in forma pauperis.

A suit for maintenance was decreed in part, the plaintiff being allowed maintenance at the rate of Rs. 15 per month, and the defendant deposited in Court Rs. 570 being the amount due till then. The plaintiff applied for leave to appeal *in forma pauperis* claiming maintenance at the rate of Rs. 60. *Held*, permission to appeal as a pauper should not be given as there was in Court deposit a sum more than sufficient to pay the requisite Court fee. 30 Bom. 593 refd. to ; 10 Bom. 207 folld.; 47 Bom. 523 dissented from.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Petitioner.

T. S. V.

The Chief Justice and Beasley, J. }
17th August, 1925. } *Ref. No.* 3 *of* 1924.

Income-tax Act (*XI of* 1922), *Ss.* 9 (7) *and* 34—*House furnished and ready for occupation—Vacancy—Decision of Income-tax Officer after notice—If can be re-opened.*

A house which is furnished and ready for occupation must, for the purposes of the Income-tax Act, be taken to be occupied and deduction cannot be claimed as in respect of vacancies, even if no one lived there actually during the year of assessment. 2 Q. B. D. 581 folld.

Where an Income-tax Officer after notice to the assessee deliberately decides one item to be unassessable, he has power under S. 34 to re-assess it next year. The words "escape assessment" and "or has been assessed at too low a rate" are sufficiently wide for this purpose.

T. R. Ramachandra Aiyar and *L.S. Veeraraghava Aiyar* for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

T. S. V.

Phillips and Ramesam, JJ. 18*th August*, 1925. } *S. R. No.* 14383 *of* 1924.

Court Fees Act, S. 7 (ix) and Sch. I, Art. 1—Suit on kanom—Appeal relating solely to amount of improvements—Ad valorem *fee if payable.*

Arising out of a decree in a suit to redeem a kanom, an appeal was filed in which the right to redeem was not disputed, but only the amount of compensation for improvements due to him. *Held*, Court-fee was payable *ad valorem* on the extra amount claimed as compensation. S. 7 (ix) of the Court Fees Act applies only to suits and not to appeals. 23 Mad. 84 distd.; 29 Mad. 367 ; 27 All. 447 ; 36 All. 40 folld.

K. P. Ramakrishna Aiyar for Appellant.

The Government Pleader for the Crown.

T. S. V.

Jackson, J. 18*th August*, 1925. } *C. R. P. No.* 765 *of* 1923.

Civil Procedure Code, Sch. II, R. 1—Reference to arbitration—Defendant ex-parte *but still interested—Not a party to the reference—Award—Effect of—Interference in revision.*

Where in a suit a defendant is declared *ex parte* and a reference to arbitration is made to which he is not a party though he is "interested" within the meaning of R. 1, the award that is passed is not a valid one and can be set aside in revision. 27 C. L. J. 939 ; 42 Mad. 632 ; 29 Cal. 167 (P. C.) referred to.

K Bhashyam Aiyangar for Petitioner.

A. Venkatrayaliah, Venkatanarasiah and *V.C. Viraraghavan* for Respondent.

T. S. V.

PRIVY COUNCIL.

2nd & 3rd July, 1925.—*Ahmed Khan and others* v. *Mst. Channi Bibi* (Lahore—Appeal No. 74 of 1921).

CORAM : *Lord Finlay, Sir John Edge, Mr. Ameer Ali* and *Mr. Justice Duff.*

The respondent (plaintiff) here claimed, as sister of one Waris Ali, deceased, certain lands in the village of Surg Sahur, near Attock, and the question is what are her rights according to Muhammadan Law or the custom of the Khattar tribe.

L. de Gruyther, K. C. and *E. B. Raikes* for Appellant.

Dr. H. R. Majid for Respondent.

Judgment reserved.

6th July.—*Mst. Farid-un-nissa* v. *Mukhtar Ahmed and another.* Judgment delivered, allowing the appeal.

6th July.—*Kushaldas Gokuldas and another* v. *Chunilal Kalidas and others* (Bombay).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

The respondents (plaintiffs) in Suit No. 446 of 1919 claimed a 2-anna share of the appellants' (defendants') commission as agents of the Hemabhai Manufacturing Co., Ltd. for the period 1915—1917, and in Suit No. 693 of 1922 for the period 1918—1921. The appellants *inter alia* denied the claims, and also pleaded the Limitation Act, 1898, as regards the commission for 1915 and 1918. The Subordinate Judge, Ahmedabad, upheld the defence of limitation, but, on the whole, decreed the first suit for Rs. 5,395, and the second for Rs. 14,504-11-11. Upon appeal and cross-appeal, the High Court, Bombay, rejected the defence of limitation, and enhanced the decree in Suit No. 446 of 1919 by Rs. 562-5-4 and that in Suit No. 693 of 1922 by Rs. 1,826-5-0 ; and they refused leave to appeal holding that the judgments were in substance concurrent and beyond the question as to the time at which the commission was payable, there was no question of law under S. 110, Civil Procedure Code, 1908. The defendants now prayed for special leave to appeal, contending that (1) their appeal arose through the High Court judgment varying, and not affirming, that of the Subordinate Judge ; (2) the defence of limitation raised a substantial question of law.

Sir G. Lowndes, K. C. and *J. M. Parikh* for Petitioner.

Petition granted.

6th & 7th July.—*Md. Khaleel Shirazi & Sons* v. *Les Tannerie Lyonnaises and Marret* (Madras—Appeal No. 30 of 1924).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

On the 27th May, 1917, the appellants (plaintiffs) alleged that the first respondents, by their Manager, the second respondent, entered into a contract with them, whereby the appellants were to buy goat-skins for the respondents, half-tan them by a certain process, and deliver them to the respondents at Pondicherry in exchange for (*a*) the cost of the raw skins ; (*b*) 10 per cent. on the purchases for financing ; (*c*) Rs. 17-8-0 per 100 skins for half-tanning. The appellants claim accordingly Rs. 1,70,000. Phillips, J., on the 20th October, 1920, dismissed the action as against the second respondent, but gave judgment for Rs. 1,49,063, with interest and costs as against the first respondents. This latter sum was, on the 14th March, 1922, reduced by the Court of Appeal (Coutts Trotter and Ramesam, JJ.) to Rs. 25,824 and costs and interest.

Sir G. Lowndes, K. C., K. Brown and *T. C. K. Kurup* for Appellants.

A. M. Dunne, K. C. and *B. White* for First Respondents.

E. B. Raikes for Second Respondent.

9th July.—Hearing resumed, and adjourned to October Sittings.

7th July.—*Bhupendra Narayan Singh* v. *Narapat Singh.*

Judgment delivered, allowing the appeal.

10th July.—*M. A. Mamoojee* v. *Howeson Bros.* (Bengal—Appeal No. 150 of 1924).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

In the respondents' suit on two mortgages, the usual preliminary mortgage-decree was passed, and it was also ordered that one, Harvey, be appointed Receiver of the rents and profits of the mortgaged property on furnishing security in Rs. 60,000 to the satisfaction of the Registrar. The appellant stood surety for Harvey, and executed a bond to the Registrar, but later applied to be discharged therefrom on being dissatisfied with Harvey's management. No order was made on the application. Subsequently, on the application of the respondents, under S. 145 of the Civil Procedure Code, Greaves, J. ordered the

appellant to pay to respondents the sum of Rs. 32,806-14-3 found due by Harvey as Receiver. This order was confirmed on appeal on the 8th May, 1923.

L. de Gruyther, K. C. and *K. Brown* for Appellant.

A. M. Dunne, K. C. and *G. D. McNair* for Respondents.

Appeal dismissed with costs.

13th and 14th July.—*Ram Protap Chamria* v. *Durga P. Chamria and others* (Bengal—Appeal No. 120 of 1924).

CORAM : *Lord Blanesburgh, Lord Darling,* and *Sir John Edge.*

On the 12th January, 1922, the appellant sued the respondents (of whom the 5th was a minor) for dissolution of a partnership carried on under an agreement of November, 1916. On the 23rd May, 1922, in accordance with an agreement arrived at between the parties on the 11th May for the reference of *all* disputes between the parties to arbitration, an order was made in the pending suit, referring matters *in litigation therein* to arbitration. The arbitrators made their award on the 27th May. On the 5th July, 1922, Respondent No. 4, as guardian *ad litem* of Respondent No. 5, gave notice of his objection to the award on the ground that it purported to deal with matters not in question *in the suit.* The Courts in India accordingly set aside the award.

L. de Gruyther, K. C. and *W. Wallach* for Appellant.

W. H. Upjohn, K. C., Sir G. Lowndes, K. C., A. M. Dunne, K. C. and *K. V. L. Narasimham* for Respondents.

Judgment reserved.

16th, 17th, 20th, and 21st July—*Saklat and others* v. *Bella* (Lower Burma—Appeal No. 57 of 1924).

CORAM : *Lord Phillimore, Lord Blanesburgh,* and *Sir John Edge.*

Plaintiffs (appellants), who are Parsis, relying on *Petit* v. *Jeejeebhoy,* 33 Bom. 509, claim that the respondent, who is the daughter of a Parsi mother by a Goanese father, was not, and indeed could not, be legally adopted by the late Shapurjee Cowasjee, and further that she could not be rightly received into the Zoroastrian religion by the *navjot* or *barasnam* ceremonies, and that consequently she was not entitled to the use of the Parsi Fire Temple at Rangoon, the site of which was

granted by Government to the Parsis as a religious community, and not as a race.

A. M. Dunne, K. C., Sir G. Lowndes, K. C. and *E. B. Raikes* for Appellants.

W. H. Upjohn, K. C. and *W. Draper* for Respondent.

Judgment reserved.

17th July.—*Chandra Sen and another* v. *Kanhaiya Lal* (Allahabad).

In March, 1921, the respondent's suit against the appellants for Rs.14,543, due on a mortgage-bond, dated the 31st May, 1908, was dismissed by the Subordinate Judge, Aligarh, but was decreed on appeal by the High Court in December, 1924, who also subsequently granted them a certificate under Ss. 109 and 110, Civil Procedure Code, for appeal to the Privy Council. The petitioners, who are minors, aged 9 years and 7 years, respectively, under the guardianship of *Purdanashin* ladies, having failed in due time to furnish security for costs, the leave to appeal was cancelled on 12th June, 1925. But they thereafter found the necessary security by mortgage. Hence their present application for special leave to appeal.

S. Hyam for Petitioners.

Leave granted.

20th July—*Bejoy Chand Mohatab* v. *Kohoha Sinha and others* (Bengal).

The respondents having failed to pay rent due under a *Patni* settlement, the land was sold by public auction, but this sale was later set aside by the High Court. The petitioner then brought an action for the arrears of rent, and the questions raised were whether time under the Limitation Act, 1898, runs under Art. 110 thereof from the date when the sale was set aside or when the rent became due. The Courts in India had decided in favour of the latter alternative. The plaintiff now applied for special leave to appeal.

Parikh for Petitioner.

Petition dismissed.

21st July—*Sourendra Mohan Sinha and others* v. *Har P. Sinha and others*. Judgment delivered, dismissing the appeal, but allowing the cross-appeal.

21st July—*Mahabir P. Tewari* v. *Jamuna Singh and another.* Judgment delivered, dismissing the appeal.

A de M.

HIGH COURT.

The Offg. Chief Justice and Viswanatha Sastri, J. } *A. S. No.* 252 *of* 1922.

7th August, 1925.

Specific performance—Suit for—Damages for mental worry —If can be awarded—No covenant to discharge encumbrances—Decree directing vendee to discharge—Validity of—T. P. Act, S. 55 (2)—*Covenant to discharge encumbrances—If runs with the land.*

In a suit for the specific performance of an agreement to sell land, the plaintiff, in addition to getting a decree for specific performance, cannot obtain damages for mental worry, loss of interest, etc.

Where there was no express covenant on the part of the original vendors to discharge the encumbrances on the property and the decree nevertheless directed both the vendors and the subsequent purchasers to discharge the encumbrances, the decree in so far as it affects the purchaser is not valid in law ; neither S. 18 (*c*) nor S. 27 of the Specific Relief Act will apply.

Quaere : Whether an implied covenant to discharge encumbrances under S. 55 (2) of the T.P. Act will run with the land so as to affect subsequent purchasers for value ?

T. V. Ramanatha Aiyar and *A. Krishnaswami Aiyar* for Appellants.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* for Respondent.

T. S. V.

Jackson, J.

14th August, 1925. } *Cr. Rev. Case No.* 47 *of* 1925.

Penal Code, S. 225 (*b*)—*Civil Procedure Code, S.* 55—*Arrest by Court Bailiff for Civil Court-decree after sunset—Escape from arrest—Veranda, if part of dwelling-house.*

Where the accused was arrested in the veranda of his house after sunset in pursuance of a warrant for a Civil Court decree and he escaped from arrest, and was charged and convicted under S. 225 (*b*), Indian Penal Code ;

Held, the arrest was illegal as the veranda was part of a dwelling under S. 55, Civil Procedure Code, and the accused could not be arrested after the sunset in a dwelling-house.

K. P. Ramakrishna Aiyar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Jackson, J.
18*th August*, 1925. } *C. R. P. No.* 923 *of* 1923.

Specific Relief Act, S. 9—Landlord and tenant—Latter in possession—Right of landlord to sue trespasser.

Where a tenant is in possession under a subsisting lease, a landlord cannot maintain a suit under S. 9, Specific Relief Act, against a trespasser. 18 All. 437 ; 21 Mad. 288 ; 19 M. L. J. 347 ; 44 Mad. 937 folld. ; 15 I. C. 146 dissented from.

K. Rajah Aiyar and *N. Panchapakesa Aiyar* for Petitioner.

B. Somayya for Respondent.

T. S. V.

Viswanatha Sastri, J.
19*th August*, 1925. } *C. R. P. No.* 740 *of* 1923.

Madras District Municipalities Act, S. 95—Profession tax—Ownership of house—Residence—If amounts to—Tax imposed by Chairman—Failure to appeal to Municipal Council—Bar of suit for refund.

A person who owns a house within a municipality into which he could go at any time he pleased, must be deemed to have resided in the municipality for the purposes of S. 95 of the District Municipalities Act, even though he did not actually live there.

Where a person assessed to profession tax by the Chairman of a Municipal Council omits to appeal to the Municipal Council, but files a suit for the refund of tax paid under protest, the suit is barred.

K. R. Rangaswami Aiyangar for Petitioner.

N. Rajagopalachari for Respondent.

T. S. V.

Phillips, J.
19th August, 1925. } *S. A. No.* 292 *of* 1923.

Execution—Order for sale—Death of judgment-debtor—Sale without notice to legal representative—Nullity.

Where after an order for sale in execution of a decree, the judgment-debtor dies, and the sale takes place and is completed without notice to his legal representative, it is a nullity. 42 Cal. 72 (P. C.) and 41 M. L. J. 547 folld. ; 47 Mad. 68 not folld. ; 47 Mad. 288 (F. B.) relied on.

P. Satyanarayana Rao for Appellant.

C. S. Venkatachari and *A. Venkatachelam* for Respondent.

T. S. V.

Madhavan Nair, J.
19th August, 1925. } *S. A. No.* 754 *of* 1921.

Hindu Law—Joint family—Debt incurred by father—Suit against father and sons—Sons exonerated—Decree against father alone—Attachment and sale of the joint family properties—If son's share will pass.

Where a debt was incurred by a father of a joint Hindu family and a suit was filed against the father and sons, but the sons were exonerated and a decree was passed against the father alone, and joint family properties were attached and sold in auction :

Held, it is open to the decree-holder to sell the sons' shares also though they were exonerated under the decree.

28 A. 288 followed.

C. Narasimhachari for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
20th August, 1925. } *O. S. A. No.* 80 *of* 1924.

Indian Succession Act, S. 117*—Will—Construction—Gift over—Condition—Strict construction.*

A clause in a will provided as follows :—" I bequeath the residue of my estate to the grandson or grandsons that may or will be born to my son *X* within 10 years after my death. If there are no such grandsons born as aforesaid, the residue will

be distributed among my grand-daughters after my wife's death.'' By a codicil he postponed the distribution to the grand-daughters until after the death of his son, wife and daughter-in-law. There were no grandsons alive on the date of the death of the testator, but one was born within two years of his death. One of the grand-daughters claimed that as there was no grandson on the date of the testator's death, the gift over took effect. *Held*, the case fell within S. 117, Indian Succession Act, and that the condition subject to which the gift over was made should be strictly fulfilled before the grand-daughters could take. As a grandson was born within 10 years of his death, the condition was not fulfilled. English case-law discussed. 38 Bom. 697 doubted.

O. T. Govindan Nambiar and *S. Satagopa Mudaliar* for Appellant.

A. C. Sampath Aiyangar and *P. Krishnamachari* for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
25th August, 1925. — *C. M. A. No.* 380 *of* 1923.

Civil Procedure Code, S. 39—Transfer of decree for execution—Legal representatives of judgment-debtor—Application to bring on record—Forum—Question of limitation—Decision before transmission.

An application to bring the legal representative of a judgment-debtor on record for purposes of execution can be entertained only by the Court which passed the decree. The question must be decided after investigation, if there is a dispute as to who is the legal representative and cannot be reserved for determination by the Court to which the decree is transmitted. 28 Mad. 466 applied.

Questions of limitation, etc., must also be disposed of before transmission by the Court which passed the decree. 19 L. W. 650 referred to.

S. R. Muthusami Aiyar for Appellants.

M. Subbaraya Aiyar for Respondents.

T. S. V.

Jackson, J.
28th July, 1925. } *C. M. S. A. No.* 47 *of* 1924.

Presidency Towns Insolvency Act, S. 30—*Composition — Order approving composition— Binding nature of, on creditors not mentioned in the schedule.*

Under S. 30 of the Presidency Towns Insolvency Act of 1909 the composition approved by the Court is binding not only upon the creditors of the insolvent whose names are entered in the schedule but also against all the other creditors of the insolvent. 48 M. L. J. 252 referred.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for Appellants.

S. Varadachariar, V. C. Veeraraghava Aiyangar and *R. Viswanatha Aiyar* for Respondent.

C. A. S.

Jackson, J.
5th August, 1925. } *S. A. No.* 1806 *of* 1923.

Practice and procedure—Suit by plaintiff to recover properties for himself and some of the defendants—Claim by the defendants for their shares—Decree for the shares of the defendants, whether can be passed.

Plaintiff sued for recovery of certain properties for himself and certain of the defendants paying the entire court-fee himself, on foot of an arrangement under which plaintiff equally with those defendants was entitled to the properties in question. Those defendants also claimed their shares of the properties in their written statements and the Courts below passed a decree for partition in favour of those defendants as well as the plaintiff. On a point taken in second appeal that the defendants should not have been given a decree, *held,* distinguishing 35 M. L. J. 153, that the suit as framed was comprehensive enough to sustain a decree in favour of the defendants as well as the plaintiff.

P. Somasundaram and *P. Satyanarayana* for Appellants.

Ch. Raghava Rao for Respondent.

C. A. S.

N. R. C.

Phillips, J.
10th August, 1925 } *S. A. No.* 43 *of* 1923.

Civil Procedure Code, S. 11, *Explanation* 4—*Suit for possession based on an arrangement, dismissed as arrangement not proved and on the ground of adverse possession—Subsequent on title as heir* —Res judicata.

A person sued certain trespassers in possession alleging that the properties originally belonged to one Venkanna, that, after his death, he became his heir, that he allowed a female relation of the said Venkanna to enjoy the suit properties for her maintenance, that she having died the defendants refused to deliver possession. The suit was dismissed on the ground that even assuming plaintiff was the heir of Venkanna, his agreement with the lady was not made out, and that the lady had acquired title by adverse possession. Thereafter the plaintiff brought the present suit against the same defendants alleging that even assuming the property to be the property of the lady as found in the former suit he would be the sole heir to her entitled to recover possession.

Held, that the present suit was barred by *res judicata* under Explanation IV to S. 11 of the Code of Civil Procedure. 46 M. 135; 52 I. C. 735; 34 I. C. 456 ; 1916 M. W. N. 287 ; 48 M. L. J. 64 (P.C.) ; 11 B. L. R. 158 (P.C.) followed. 26 M. 760 ; 7 M. 264 distinguished.

Ch. Raghava Rao for Appellant.

B. Jagannadha Doss for *V. Suryanarayana* for Respondent.

C. A. S.

Phillips, J.
17th August, 1925. } *S. A. No.* 265 *of* 1923.

Co-purchasers—One paying more than his share of the purchase money—Whether a charge is created on the other's share.

The 1st and the 2nd defendants together purchased the suit properties in 1914, the 1st defendant advancing Rs. 340 and the 2nd defendant only Rs. 60, but both intending to take the properties in equal halves. At the time of purchase the properties were in the possession of an usufructuary mortgagee. In 1918 the 1st defendant redeemed the mortgage and got into possession. An alienee from the 2nd defendant afterwards

commenced the present suit for redemption and partition of his half share in the suit properties offering to pay the 1st defendant half the amount paid by her to the mortgagee. The latter claimed as a condition precedent also the payment of the sum of Rs. 140 paid by her in 1914 in excess of her share of the purchase money with interest. *Held*, that she could do so and that whether there was a charge in law or not, in equity such a claim could be enforced

A. V. Narayanaswami Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

T. S. V.

Phillips, J.
20th August, 1925. } S. A. No. 86 *of* 1923.

Civil Procedure Code, S. 102—*Suit for value of goods sold —If of a small cause nature—No second appeal.*

A suit by a vendor against a vendee for the value of goods sold is a suit of a small cause nature and no second appeal lies where the amount in question is below Rs. 500.

M. Krishna Bharati for Appellant.

K. R. Rangaswami Aiyangar for Respondent.

T. S. V.

Jackson, J.
21st August, 1925. } C. R. P. No. 108 *of* 1925.

Civil Procedure Code, O. 13, *R.* 1—*First hearing, meaning of—Date of settlement of issues.*

The expression "first hearing" in O. 13 R. 1 of the Civil Procedure Code means the date of the settlement of issues and not the date when the case first heard on evidence. 8 C. L. J. 147 ; 78 I. C. 489 followed. 50 I. C. 295 not followed.

K. S. Jayarama Aiyar for Petitioner.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

The Chief Justice and Viswanatha Sastri, J.
24th August, 1925. } *O. S. A. No.* 83 *of* 1924.

Shipping—Charterparty—Shipowner if common carrier—Law applicable—Advance freight—If recoverable, in cases of frustration of adventure.

A ship was chartered to carry rice from Akyab to the Madras Coast and the terms of the charterparty were that one portion of the freight was payable on acceptance of the charter, another portion on loading the cargo and the balance on delivery of the cargo. The advance freight was paid, but cargo could not be loaded as the necessary license was refused by the Controller. In a suit for damages on the basis of the charter-party, there was a counter-claim by the charterer for refund of the advance freight under S. 65, Indian Contract Act. The suit was dismissed, and the counter-claim decreed, the finding of the Trial Judge being that both parties were aware that a license had to be taken out and that it was an implied condition that the license should be obtained by the defendant. In an appeal by the shipowner as regards the decreeing of the counter-claim for refund of advance freight paid, *held*, (1) where a ship is chartered wholly, the shipowner is not a common carrier and hence the parties are governed by the Indian Contract Act and not by the Common Law of England. 38 Mad. 941 distd. ; (2) the principle of law that advance freight paid could not be recovered is not one peculiar to the maritime law of England but is only part of the general law of contracts and forms an example of a contract with an executed consideration.

40 Bom. 529 folld. ; (1903) 2 K. B. 756 considered and explained ; 48 M. L. J. 413 referred to.

S. Srinivasa Aiyar for Appellant.

K. Sundara Rao for Respondent.

T. S. V.

Phillips and Ramesam, JJ. 25*th August*, 1925. } *S. A. No.* 11 *of* 1922.

Landlord and tenant—Lands classified as permanent or shifting—Levy of poll-tax and plough-tax—Occupancy rights—Jagirdar—Rights of—Land if an estate.

In a jagir in the South Arcot District, the lands under cultivation were classified according as the cultivation was more or less permanent or shifting. The only tax levied from the persons in occupation were a poll-tax and plough-tax and the lands were not assessed to any rent. *Held*, the ordinary law of landlord and tenant applied and the tenants had no permanent occupancy rights. But the tenants were entitled to all the produce including the minor forest produce ; if the jagirdar

claimed to be entitled to such minor forest produce, he must prove a contract or custom to that effect.

Per Ramesam, J.—The jagir was not an estate within the meaning of S. 3 (*d*) of the Madras Estates Land Act.

41 Mad. 1012; 36 Bom. 658 ; 46 Mad. 335; S.A. Nos. 1355 to 1362 of 1910 ; S. A. Nos. 261 and 262 of 1911 referred to.

C. V. Anantakrishna Aiyar and *A. V. Viswanatha Sastri* for Appellants.

T. Rangachari, C. Padmanabha Aiyangar and *T. D. Srinivasachari* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
26th August, 1925. — *A. S. No.* 333 *of* 1922.

Civil Procedure Code, S. 92—Interest — What is—Residence in the neighbourhood—Occasional worship —Suit for recovery of property—Decision adverse to the trust in a prior suit by trustee —If res judicata.

A decision to the effect that a certain property does not belong to a trust given in a suit by the trustee to recover possession of the property operates as *res judicata* in a subsequent suit filed by relators with the sanction of the District Collector under S.92, Civil Procedure Code, for the recovery of the same.

The "interest" contemplated by S. 92 must be direct, substantial and not illusory. Persons living in the neighbourhood of a temple and worshipping there, though not habitually, are persons interested within the meaning of the section. 42 Mad. 360; 47 Mad. 884 (P.C.) referred to.

G. Lakshmanna and *K. Kameswara Rao* for Appellant.

P. R. Ganapathi Aiyar, V. Krishna Mohan, G. Krishna Arya and *Viraraghavalu* for Respondents.

T. S. V.

Jackson, J.
26th August, 1925. — *C. R. P. No* 426 *of* 1925.

Madras District Municipalities Act—Rules for the decision of disputes as to the validity of elections, R. 12 (2) (*b*)*—Election set aside—Re-election ordered—Propriety of order.*

Where in setting aside the election of the respondent at a Municipal election, the Court below ordered a "re-election"

admitting the petitioner as a candidate for such re-election, *held*, the order was wrong and under R. 12 (2) (*b*) of the Rules for the decision of disputes as to the validity of elections, the Court should order a fresh election

K. Kameswara Rao for Petitioner.

C. Sambasiva Rao and *K. Ramamurthi* for Respondent.

T. S. V.

Phillips, J.
27th August, 1925. } *S. A. No.* 867 *of* 1923.

Madras Estates Land Act, S. 151—*Ejectment—Occupancy ryots--Sale of major portion of land for building purposes—Effect of.*

The sale by an occupancy ryot of 14 acres out of an entire holding of 15 acres for building purposes to several persons impairs the value of the holding for agricultural purposes and the ryot can be ejected on the basis of such act alone.

C. S. Venkatachari and *A. Venkatachellam* for Appellant.

Sir K. V. Reddi for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
28th August, 1925. } *C. M. A. No.* 450 *of* 1924.

Civil Procedure Code, Ss. 19, 21, 24, 39—*Mortgage decree—Transfer for execution—Court having no jurisdiction over properties—Effect of.*

Where a mortgage decree is transferred for execution to a Court which has no jurisdiction over the mortgaged properties, a sale held in execution of the decree is not void for want of jurisdiction. All defects as to jurisdiction are curable by S. 21, Civil Procedure Code, and the exception as to a mortgage decree in S. 19 will apply even if the properties are situated wholly outside the Court's jurisdiction.

S. 24, Civil Procedure Code, will also apply to a case of transfer of decree for execution and it is not governed by S. 39.

S. Varadachariar and *K. Champakesa Aiyangar* for Appellant.

The Advocate-General, T. M. Krishnaswami Aiyar and *N. Sivaramakrishnier* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *28th August,* 1925. — *L. P. A. Nos.* 64 *to* 66 *of* 1924.

Negotiable Instruments Act, Ss. 28, 29—*Pronotes executed by guardians and by executors—Description as guardians in the body of the note—If sufficient to exclude personal liability of guardians—Signature as guardians—Whether makes a difference —Executors—Liability not limited to assets in the pronote—Effect —Will void and executors not validly appointed—Whether renders S.* 29 *inapplicable—Principle of S.* 28—*If applies to guardians' pronotes.*

Although in terms S. 28 of the Negotiable Instruments Act applies only to agents, its principle is applicable to pronotes executed by guardians as representing a minor. And, that the personal liability of the guardians is excluded, must appear on the face of the note itself. 46 C. 663 (P.C.) applied.

Where two guardians executed a pronote reciting in the body "Viswanadhan being a minor," and reciting that it was in renewal of a debt of the deceased father of the minor, and bound themselves severally (" either of us ") to pay, and signed it without adding any qualification to the signature, *held*, they were personally liable.

But where the signatures also were qualified by the addition of the words "guardians,' *held*, they were *not* personally liable.

Where persons describing themselves as executors executed a pronote, but said nothing about limiting their liability to the assets of the deceased, *held*, they were personally liable on the pronotes.

That the will by which they were so appointed was void under the Hindu Law as having been made by an undivided Hindu father was held to make no difference in the decision of the case on the pronote. 47 M. L. J. 765 in part affirmed and in part reversed.

A. Krishnaswami Aiyar, B. Satyanarayana and *K. N. Rajagopal Sastri* for Appellants.

P. Somasundaram for Respondents.

T. S. V.

Ramesam, J. *3rd September,* 1925. — *S. A. No.* 1565 *of* 1922.

Benamidar—Suit for specific performance—Whether entitled to obtain decree.

N R C

A benamidar is entitled to maintain a suit and obtain a decree for specific performance.

P. Somasundaram and *E. Krishnamurthi* for Appellant.

G. Lakshmanna and *K. Kameswara Rao* for Respondents.

C. A. S.

Reilly, J. *4th September*, 1925.	*S. A. No.* 209 *of* 1923.

Contract Act, S. 11—*Minor stating that he was a major and executing a sale deed—Suit by minor after majority to set aside sale deed—Whether estopped from pleading minority—Specific Relief Act, S.* 41—*Whether Court can impose terms in granting relief.*

Where a person represented that he was a major and executed a sale deed and later on brought a suit for setting aside the sale on the ground that he was a minor at the time of executing the sale : *Held*, (1) that he was not estopped from pleading his minority and that the sale was not binding on him, as he was a minor at the time of the sale ; (2) that in granting relief the Court may impose terms under S. 41 of the Specific Relief Act and order that the money paid to the minor be refunded to the vendee. A. S. No. 89 of 1920 (unreported) and 10 L. W. 225 followed. 7 L. W. 134 referred to. 41 B. 480 and 46 B. 137 not followed.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Appellant.

B. Somayya and *E. Krishnamurthi* for Respondent.

C. A. S.

The Chief Justice and Beasley, J. *7th September*, 1925.	*O. S. A. No.* 15 *of* 1925.

Income-tax Act, S. 10 (2) (*vii*)—*Obsolete—Meaning of—Items in the section to be read disjunctively.*

The term " obsolete " in S. 10 (2) (vii) of the Income-tax Act connotes uselessness arising from supersession of the article by improved designs in machinery and does not include a case where the article—in this case a motor-car—was lost or damaged in an accident.

The various items of deduction mentioned in S. 10 ought to be read disjunctively and the mere fact that some items

overlap is no ground for refusing deduction. Where the items claimed to be deducted are not in the way of capital expenditure, the assessee can claim the same as deduction.

K. V. Sesha Aiyangar for Appellant.

M. Patanjali Sastri for Respondent.

T. S. V.

Spencer, J.
7th September, 1925. } *S. A. Nos.* 1803 *and* 1804 *of* 1922.

Hindu Law—Joint family—Alienee from one co-parcener—Suit in ejectment and counter-suit for specific performance—Partition decree if can be awarded in suit for possession.

In a joint family consisting of A and B, B agreed to sell to C an item of family property and put C in possession. B died leaving two sons D and E, and a suit was filed by A, D and E to eject C. C pleaded that the properties belonged to B as his self-acquisition and also brought a suit for specific performance. The property was found to be joint family property. *Held,* C was entitled to specific performance with regard to half the property on the ground that D and E claimed under B within the meaning of S. 27, Specific Relief Act, and resist the suit for possession with respect to such share. A preliminary decree for partition could be passed in the ejectment suit, and the suit in ejectment could be decreed only with regard to A's half share. 46 Mad. 219 relied on ; 20 Mad. 354 ; 17 L. W. 346 and other cases discussed.

Ch. Raghava Rao for Appellant.

B. Jagannadha Das with *V. Suryanarayana* for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
8th September, 1925. } *C. M. A. No.* 86 *of* 1925.

Execution—Attachment before judgment—Sale without attachment—Dismissal of objection—Appeal, if competent—Sale if illegal—Prejudice.

A decree-holder who had obtained an attachment before judgment applied for execution, but in the application did not pray for a fresh attachment. The judgment-debtor objected to the execution application on the ground that there was no

prayer for attachment. The objection was overruled and sale directed to be held. After the sale the judgment-debtor appealed against the order dismissing his objections. *Held,* per *Spencer, J.,* the appeal was not maintainable and his remedy is under O. 21, R. 90. Per *Madhavan Nair, J.*—A sale without an attachment is not illegal and unless the judgment-debtor is shown to have been prejudiced, it cannot be set aside. 18 Cal. 188 ; 30 Mad. 255 at 264 ; 24 M. L. J. 70 ; 37 I. C. 964 ; 21 All. 311 relied on ; 38 Cal. 482 ; 36 Bom. 156 not followed; 41 Cal. 590 (P. C.) distinguished.

The Advocate-General and *M. Krishna Bharati* for Appellant.

T. R. Ramachandra Aiyar and *P. R. Ramakrishna Aiyar* for Respondents.

T. S. V.

Jackson, J.
8th September, 1925. } *C. R. P. No.* 776 *of* 1923.

Civil Procedure Code, O. 21, *Rr.* 13 *and* 17—*Application for execution not in accordance with law—Schedule of immoveable properties not given—Amendment after period of limitation—If application in time.*

Where an application for execution of a decree, dated 7th March, 1910, was filed on 28th February, 1922, and the prayer was for attachment of immoveable properties, the list of which it was stated would be filed later and was filed only on 5th April, 1922, on which date the execution of the decree was barred, *held,* the application must be deemed to be out of time as the original application was not in accordance with law and the execution Court must be deemed to have refused to extend the time as no further time was fixed on the original application. 45 M. L. J. 651 distinguished ; 17 C. 631 referred to.

R. Govinda Menon for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
9*th September*, 1925.
C. *M. A. No.* 70 *of* 1925.

Civil Procedure Code, S. 47—*Appeal—Scheme framed for a temple—Order appointing trustee under scheme.*

An order appointing a certain person as trustee of a temple under a scheme framed by the Court is not an order in execution of a decree and hence is not appealable.

T. M. Krishnaswami Aiyar and *K. S. Varadachari* for Appellant.

K. V. Sesha Aiyangar for Respondent.

T. S. V.

Jackson, J.
9*th September*, 1925.
Cr. Rev. Case No. 409 *of* 1925.

Workmen's Breach of Contract Act—Proceedings under—Nature of—Adjudication of workman—Protection order—Default in payment of advance—If liable to imprisonment.

A workman was directed to repay his master under the Workmen's Breach of Contract Act the advance received by him in monthly instalments. He was subsequently adjudicated insolvent, the debt due to the master being included in the schedule and protection order was granted in respect thereof. He committed default in payment of the monthly instalment and a Magistrate sentenced him to imprisonment for such non-payment. It was argued that Ss. 17 and 46 of the Presidency Towns Insolvency Act barred such proceedings being valid. *Held*, the bar contained in those sections did not apply to criminal proceedings and as the proceedings before the Magistrate under the Workmen's Breach of Contract Act were criminal proceedings, the conviction was legal. 35 Bom. 63 followed.

T. K. Rangaswami for Petitioner.

R. Satyanarayana for Respondent.

T. S. V.

Devadoss and Waller, JJ.
11*th September*, 1925.
C. *M. A. No.* 346 *of* 1924.

Civil Procedure Code, S. 2 (2) *and* O. 22, *Rr.* 3, 5—*Death of plaintiff—Only one person claiming to be impleaded as*

legal representative—Dismissal of application—Order if amounts to a decree—Appeal.

Their Lordships referred to a Full Bench the question whether an order of dismissal passed on an application put in by a sole claimant to be impleaded as the legal representative of a deceased plaintiff amounts to a decree and as such is appealable.

K. Bashyam Aiyangar for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondent.

T. S. V.

Jackson, J.
1*1th September*, 1925. } *C. M. S. A. No.* 100 *of* 1923.

Civil Procedure Code, O. 34, *Rr.* 4, 5 *and* 15—*Suit to enforce a charge—Decree for sale—No final decree passed—Application for execution of preliminary decree—Construction.*

Where in a suit to enforce a charge a decree was passed directing the defendants to pay plaintiff within two months the sum of Rs. 458 with interest and costs and in default of payment within the time fixed the plaintiffs were to recover the amount by the sale of the rights of defendants 1 to 3 over the plaint property and from their other properties and an application was put in for sale. *Held*, on a construction of the decree, that it was a preliminary decree and could not be executed without a final decree being passed.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

[Krishnan, J. held *contra* in a similar case reported in 87 I. C. 557.—REP.]

T. S. V.

Spencer and Madhavan Nair, JJ.
8th September, 1925. } *C. M. S. A. No.* 43 *of* 1923.

Civil Procedure Code, S. 47—*Mortgage suit—Defendant exonerated—Claim petition—Remedy—Appeal or suit.*

A defendant in a mortgage suit was exonerated on his setting up a plea of title paramount. In execution proceedings, he put in a claim petition under S. 47, Civil Procedure Code. *Held,* though exonerated, he was still a party to the suit, and against the order on the claim petition an appeal lay. 23 Mad. 361 followed.

R. Ganapathi and *N. Panchapakesa Aiyar* for Appellant.

K. S. Jayarama Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
8th September, 1925. } *S. A. No.* 182 *of* 1923.

Civil Procedure Code, S. 47—*Defendant struck off—Consent of parties—Claim petition—Order on—Suit to challenge—If lies.*

One of the defendants in a suit was struck off, with the consent of parties, his costs being payable by the plaintiff. A claim petition put in by him during execution was allowed and thereupon the decree-holder instituted a suit challenging the correctness of the order. *Held,* the suit was barred under S. 47 as he was still a party to the suit and the effect of the order striking off was only tantamount to a dismissal.

M. Patanjali Sastri for Appellant.

K. P. Padmanabha Pillai for Respondent.

T. S. V.

The Chief Justice and Reilly, J.
11th September, 1925. } *A. S. No.* 81 *of* 1923.

Contract—Sale of goods—Goods left with seller—Pledge by him—Failure to deliver—Rights of buyer.

A buyer of goods left them with the seller asking him to send them on whenever asked to do so and gave credit to the seller for the price in his account books. Shortly after the seller pledged the goods on his own account and failed to deliver the goods when demanded. The buyer then debited the seller with the original purchase price. *Held,* though the property in the goods had passed to the buyer, inasmuch as the

seller could not recover the purchase price, the buyer is so entitled to debit the original purchase price and not merely the price of the goods as on the date of conversion, *i. e.*, the pledge by the seller. *Chinery* v. *Viall*, 5 Hur. and Nor. 288 followed.

P. Venkatramana Rao for Appellant.

K. S. Krishnaswami Aiyar and *C. Rama Rao* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
14th September, 1925. } *C. M. A. No.* 31 *of* 1919.

Civil Procedure Code, S. 73 *and O.* 21, *R.* 71—*Default of purchaser—Resale—Deficiency in price realised—If assets under S.* 73—*Decree-holder—Who is—If can apply only for amount due to him.*

Where on a resale held on account of the default of the purchaser, a deficiency in the sale price occurs and that amount is realised, it forms "assets" within the meaning of the term in S. 73, Civil Procedure Code.

"The decree-holder" referred to in O. 21, R. 71 is the particular decree-holder at whose instance the sale took place. For the purpose of realising the deficiency he does not represent the other decree-holders, but when once the deficiency is realised by him, he holds it on behalf of the other decree-holders also.

Under O. 21, R. 71 the decree-holder can apply for realising only the total amount of the deficiency, and he cannot confine his application to the amount due to him under the decree.

T. V. Venkatrama Aiyar for Appellant.

S. Varadachari and *A. Krishnaswami Aiyar* for Respondents.

T. S. V.

Viswanatha Sastri, J.
14th September, 1925. } *S. A. No.* 189 *of* 1923.

Indian Contract Act, S. 251—*Restriction on powers of borrowing—Notice—Liability.*

In a partnership consisting of four persons, one provided capital and the others were not entitled to spend money without his permission but there was no express prohibition in the

agreement against their powers of borrowing. Moneys were lent by the plaintiff to the partners who had not contributed capital and it was found that the plaintiff had notice of an agreement not to borrow without the consent of the capitalist partner. *Held*, the latter was not liable for the amounts borrowed as the plaintiff had notice of the restrictions.

A. Krishnaswami Aiyar for Appellant.

The Advocate-General and *T.D. Srinivasachari* for Respondent.

T. S. V.

Devadoss and Waller, JJ. 15*th September*, 1925. } *C. M. A. No.* 167 *of* 192?.

Madras Estates Land Act, S. 3 (2) (*a*) *and* (*c*)—*Grant by Moghul King—Enfranchisement—Inam register referring to lands as jagir—If an estate.*

A whole village was granted by one of the Moghul Emperors to a Mahomedan as *khairati* and it was subsequently enfranchised by the British Government, and title deed issued and in the extract from the *Inam* fair register the words *Jagir, Jagirdars, Shrotriemdars* and *Inams* appeared simultaneously with reference to the village. In a suit for ejectment, *held*, the use of these words is not conclusive as regards the tenure and the village does not fall within S. 3 (2), clauses (*a*) or (*c*) of the Estates Land Act. 40 Mad. 664 ; 48 M.L.J. 654 followed.

A. Krishnaswami Aiyar and *K. Kameswara Rao* for Appellant.

S. Varadachari and *C. Sambasiva Rao* for Respondent

T. S. V.

The Chief Justice and Reilly, J. 16*th September*, 1925. } *A. S. No.* 68 *of* 1922.

Registration Act, S. 77—*Remedy given if optional—Denial of execution and refusal to register—Registration refused after enquiry—Suit for specific performance of original agreement to sell—If lies.*

In pursuance of an agreement to sell immoveable property, the defendants executed a sale deed, but when the plaintiff presented it for registration, one of the defendants denied execution. As the result of an enquiry by the District Registrar as to the fact of registration, he refused registration. The plaintiff,

instead of suing for compulsory registration under S. 77 (1) of the Registration Act, sued the defendants for specific performance. *Held,* the suit was not maintainable. 16 Mad. 342; 43 Mad. 822 followed. 7 A. L. J. 887; 44 I. C. 361 dissented from.

A. Krishnaswami Aiyar and *P. C. Venkatramayya* for Appellant.

G. Lakshmanna and *V. Viyanna* for Respondent.

T. S. V.

Jackson, J.
18*th September,* 1925. } *Cr. Rev. Case No.* 303 *of* 1925.

Penal Code, S. 405 *and Criminal Procedure Code, Ss.* 179, 181 (2)—*Criminal breach of trust—Where triable—Consequences of act—If give jurisdiction.*

The fact that the consequences of an act amounting to a criminal breach of trust occur at a place different from where the offence was committed, does not give the Court in the former place jurisdiction to try the accused for the offence under S. 405. 38 Mad. 639; 39 Mad. 576 followed.

S. A. Seshadri Aiyangar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Spencer and Madhavan Nair, JJ.
21*st September,* 1925. } *C. R. P. No.* 553 *of* 1922.

Madras District Municipalities Act (*V of* 1920), *S.* 249 *and Sch. V, cl.* (*o*)—*Storing rice—License if required—"Grain" if includes rice.*

The term "grain" in Sch. V, cl. (*o*) of the District Municipalities Act does not include rice and no license is necessary in respect of a godown where rice alone is stored for purposes of wholesale trade. (1896) A. C. 457 followed.

B. Sitarama Rao and *P. Marthandam* for Petitioner.

M. S. Vaidyanatha Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
21st September, 1925.

S. A. *No.* 1734 *of* 1922.

Civil Procedure Code, O. 41, *R.* 17—*Appellant's vakil absent—Junior applying for adjournment and on refusal reporting no instructions—Effect of—Power to decide appeal on the merits—Remedy of aggrieved party.*

On the date of hearing of an appeal, the senior vakil of the appellant was absent and the junior asked for an adjournment. The same being refused, he stated he had no instructions to proceed with the appeal. The Court after considering the merits dismissed the appeal *Held,* (1) in the circumstances there was no appearance by party or pleader, and the mere fact that the appellant was present in person was quite immaterial. 30 Mad. 274 ; 22 C. L. J. 72 followed ; the withdrawal of vakalat was not necessary, the reporting of " no instructions " being quite sufficient. 34 Lah, 403 ; 20 L. W. 427 referred to.

(2) The Court had no power under O. 41, R. 17 to decide the appeal on the merits. 43 M. L. J. 317 followed ; 35 All. 105 dist. ; and

(3) the proper remedy was not to treat the order as one under O. 41, R. 17 and refer the aggrieved party to his remedy under O. 41, R. 19 but to set it aside on second appeal. Case-law discussed.

Salem Ramaswami Aiyar for Appellants.

K. Y. Adiga, M. S. Vaidyanatha Aiyar and *T. Appaji Rao* for Respondents.

T. S. V.

Devadoss and Waller, JJ.
21st September, 1925.

C. M. P. No. 1832 *of* 1924.

Limitation Act, S. 5—*Applicability—Laccadive Islands.*

The Limitation Act has not been extended to the Laccadive Islands and hence the High Court has no jurisdiction to excuse the delay in filing a memorandum of appeal under S. 5 of the Limitation Act. History of the Laccadives traced. 30 Mad. 665 held not to be correctly decided.

K. P. Padmanabha Pillai for Petitioner.

The Government Pleader and *B. Pocker* for Respondent.

T. S. V.

N R C

Spencer and Madhavan Nair, JJ.
21st September, 1925. } *C. M. P. No.* 982 *of* 1923.

Civil Procedure Code, O. 20, R. 1—Failure to give notice of judgment—Application to vacate judgment—Pendency of—Time if can be deducted for purposes of appealing—Limitation Act, S. 5.

After judgment was delivered in an appeal, the respondent therein applied to the Court to vacate the judgment and to declare the appeal pending on the ground that no notice of delivery of judgment was given to him as required by O. 20, R. 1, Civil Procedure Code. *Held,* for purposes of filing a second appeal, he was entitled to a deduction of the time during which his application was pending under S. 5, Limitation Act.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Petitioner.

C. Aiyasami Sastri for Respondent.

T. S. V.

Devadoss and Waller, JJ.
22nd September, 1925. } *C. M. A. No.* 15 *of* 1924.

Probate—Application for—Duty of Court—Validity of the dispositions—If can be gone into.

When probate of a will is applied for, the Court can only decide if the will propounded is true. It is not open to that Court to go into the question whether the dispositions contained in the will are valid.

S. Varadachari and *N. S. Rangasami Aiyangar* for Appellant.

T. Rangachari, A. Krishnaswami Aiyar and *M. Patanjali Sastri* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
22nd September, 1925. } *C. M. A. No.* 438 *of* 1924.

Provincial Insolvency Act (V *of* 1920), *Ss.* 4, 56 (3)—*Official Receiver—Position of—Order directing Receiver to take possession—Insolvent's right to present possession—Procedure.*

The position of an Official Receiver is the same as that of a Receiver appointed under O. 40, Civil Procedure Code. The Court cannot under S. 56 (3) order a stranger to hand over to

the Receiver possession of properties to which the insolvent is not entitled to present possession. The proper procedure in such a case is to put in an application under S. 4, and not to treat the order under S. 56 (3) as one passed under S. 4. Practice of adopting loose procedure in insolvency proceedings in the mofussil deprecated.

K. Bhashyam Aiyangar and *S. Rajagopalachari* for Appellant.

K. R. Rangaswami Aiyangar and *R. Krishnaswami* for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
23rd September, 1925. — *C. R. P. No.* 644 *of* 1923.

Chit fund—If a lottery—Suit for recovering moneys paid—If lies—Indian Contract Act, S. 65*—Effect of.*

A chit fund was started with 500 subscribers. A subscriber was to subscribe Rs. 2 per month and could borrow money on security. A prize was drawn by casting lots at the end of each month, the winner getting a prize of Rs. 100 and thereafter having no connection with the fund. At the end of 50 months, the chit was to come to an end, and those who had won no prize up to then would get back Rs. 100 each, being the amount of their subscription. After a certain number of drawings, the chit transaction collapsed and one of the subscribers sued for the amounts subscribed by him. *Held,* he could not recover. The transaction amounted to a lottery, the prize winning depending on mere chance; nor could the plaintiff invoke the aid of S. 65, Indian Contract Act. Opinion of Odgers, J. in 47 M. L. J. 847 followed; 21 L. W. 403 dissented from; case-law discussed.

A. N. Krishna Aiyangar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

T. S. V.

Phillips and Ramesam, JJ.
23rd September, 1925. — *A. S. No.* 259 *of* 1921.

Aliyasantana Law—Inheritance—Branch partitioning off—Right of a member of the branch to succeed to a member of the other—Pollution observance necessary.

In an *Aliyasantana* family, a partition took place as a result of which one branch separated off from the family. A member of the separated branch claimed to succeed to the properties left by a member of the other, while the Government claimed the same by escheat. *Held*, it was not sufficient to prove the partition, but the claimant must also prove that there was observance of pollution as between him and the deceased. Sundara Aiyar's "Malabar and Aliyasantana Law," p. 194 followed.

The Government Pleader for Appellant.

B. Sitarama Rao and *K. Y. Adiga* for Respondent.

T. S. V.

Ramesam, J.
24th September, 1925. } *C. R. P. No.* 924 *of* 1924.

Madras District Municipalities Act, S. 50—*Failure to attend meetings for three consecutive months—Restoration—Fresh oath of allegiance, if necessary—Member of Taluq Board elected to District Board—Restoration to Taluq Board—Effect of.*

Where a member of a District Board fails to attend the meetings of the Board for three consecutive months and thereafter is restored to the Board under S. 50 (4), no fresh oath of allegiance need be taken by him, as he does not become a new member for a fresh term of three years. He is only restored to membership for the remaining term of his three years' period.

If a member of a Taluq Board who had been elected to the District Board loses his membership of the former by failing to attend meetings for three consecutive months and is thereafter restored to membership under S. 50 (4), he does not *ipso facto* become restored to the District Board membership. Without being again elected to the District Board, he cannot take part in its proceedings. C. R. P. Nos. 169 and 254 of 1924 followed.

T. M. Krishnaswami Aiyar and *V. Ganapathi* for Petitioner.

S. Varadachari for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
24th September, 1925.

S. A. No. 73 *of* 1923.

Madras Estates Land Act, S. 111—*Rent sale—Suit to set aside—Want of notice, proclamation, etc.—If maintainable in Civil Court—C. P. Code*, O. 21, *R.* 92 (3)—*Applicability.*

A suit lies in the Civil Court to set aside a rent sale under S. 111 of the Estates Land Act for want of notice, proclamation of sale, etc. The right of suit is not taken away by the mere circumstance that the defaulting ryot made an infructuous application to have it set aside under S. 131 of the Act. O. 21, R. 92 (3) does not apply to such a case.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Appellant.

A. Venkatrayaliah and *L. Venkatanarasayya* for Respondent.

T. S. V

Odgers and Viswanatha Sastri, JJ.
25th September, 1925.

S. A. No. 475 *of* 1923.

Madras Estates Land Act, Ss. 52, 53, 112—*Tender of patta by landlord—Increase of rent over and above that in prior patta—Non-acceptance of patta—Sale of holding—Suit to contest——Validity of patta tendered if can be gone into.*

A tenant who had been holding under a patta originally granted for a period of one year was tendered another patta in which the rent was increased and a larger acreage shown as included in his holding. He refused to accept it and failed to pay the rent, whereupon the landlord had the holding sold under the provisions of the Estates Land Act. The tenant sued under S. 112 to have the sale set aside. *Held*, the Court had power to decide whether the patta tendered was one which the tenant was bound to accept and it was not obligatory on the landlord to proceed first under S. 56 to enforce patta. There is no inconsistency between S. 52 (3) and S. 53 of the Act. Observations of Napier, J. in 6 L. W. 108 dissented from.

N R C

Per Viswanatha Sastri, J.—A decision in such suit that the patta tendered is a proper one amounts to decreeing the patta within the meaning of S. 52 (3).

M. Patanjali Sastri for Appellant.

K. Kuttikrishna Menon for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ. *28th September*, 1925. — *S. A. No.* 576 *of* 1923.

Easements Act, S. 15—Enjoyment for 40 years against Government—Darkhast grant to private person—Claim of easement against private owner.

Where a person was enjoying an easement right for a period of forty years against the Government and thereafter the Government assigned the lands on *darkhast* to a private person, a right of easement cannot be claimed against such person unless it is prescribed against him by twenty years' enjoyment, quite apart from the 40 years' period against the Government. 41 Mad. 622 followed.

K. Y. Adiga for Appellant.

B. Sitarama Rao for Respondent.

T. S. V.

Reilly, J. *29th September*, 1925. — *C. R. P. No.* 1091 *of* 1923.

Civil Procedure Code, O. 21, R. 29—Application necessary—Lodgment schedule—If sufficient.

An application is necessary before a sale can be set aside under O. 21, R. 89, C. P. Code. A lodgment schedule containing a recital that the amount was paid for countermanding the sale cannot be treated as such. (1922) M. W. N. 171 followed.

S. Subramania Sastri for Petitioner.

K. Kameswara Rao for Respondents.

T. S. V.

The Chief Justice and Reilly, J. *30th September*, 1925. — *O. S. A. No.* 83 *of* 1925.

Insolvency—Partition suit—Maintenance directed to be paid to insolvent—Omission to pay in whole—Arrears—If vest in Official Assignee.

In a suit for partition, a Receiver was appointed and he was directed to pay the 1st defendant in the suit certain

amounts by way of maintenance allowance. The Receiver did not pay in full the monthly amount fixed. The defendant was adjudicated insolvent and applied for payment of the arrears of maintenance due to him. *Held*, he was not entitled to it, as it had vested in the Official Assignee. Under S. 60 (*n*), C. P. Code, it is only the right to future maintenance that is exempt from attachment and not arrears of maintenance due and hence it vests in the Official Assignee.

R. N. Aingar and *King and Partridge* for Appellant.

V. C. Gopalaratnam for Respondent.

T. S. V.

Phillips, J.
2nd October, 1925. } *C. R. P. No.* 385 *of* 1925.

Civil Procedure Code, O. 21, R. 103—Suit under—Application for temporary injunction—Power of Court to grant.

In a suit under O. 21, R. 103 by a defeated obstructor, a Court has no power to issue a temporary injunction restraining the decree-holder from executing his decree for possession: O. 39 read with S. 94, C. P. Code, was exhaustive of the cases under which injunctions could be granted, and apart from those provisions the Court had no inherent jurisdiction to grant an injunction. 43 Mad. 94 ; 47 Mad. 171 ; 46 All. 144 folld. ; 73 I. C. 909 dissented from.

K. Ramamurthi for Petitioner.

A. Ramaswami Aiyangar for *K. Kameswara Rao* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
5th October, 1925. } *C. M. A. No.* 373 *of* 1924.

Madras Village Courts Act (as amended by Act II of 1920), *S.* 78*—Rules framed under—Validity of—R.* 18 (*b*) *if excludes jurisdiction of Civil Courts.*

A suit was filed in a Civil Court for a declaration that the election of the members of a Village Panchayat Court was invalid on account of non-compliance with the rules framed under S. 78 of the Madras Village Courts Act as amended by Act II of 1920. *Held*, (1) the jurisdiction of the Civil Courts was excluded by R. 18 (*b*) framed by the Local Government under S. 78 ; (2) where a new right and a new jurisdiction are created by statute, the decision of the new tribunal is exclusive and final ;

and (3) the rules framed under S. 78 are not *ultra vires.* 31 Bom. 604 ; 47 Mad. 325 followed.

P. Satyanarayana Rao for Appellant.

V. Ramadoss for Respondent.

T. S. V.

Viswanatha Sastri, J.
5th October, 1925. } *S. A. No.* 327 *of* 1923.

Inam—Karnam service—Usufructuary mortgage of unenfranchised inam—Redeemable after 15 *years—Subsequent sale of equity of redemption—Later enfranchisement in favour of mortgagor-vendor—Suit by, for possession,* 13 *years after mortgage and* 10 *years after sale—Expiry of* 15 *years from mortgage and* 12 *years from sale on date of decree—Form of decree—Cause of action—Accrual of, subsequent to plaint—Whether Court can take notice of.*

A Karnam mortgaged with possession his unenfranchised service inam land in July, 1907. The mortgage was redeemable only after 15 years. He sold the equity of redemption to the same mortgagee (who was in possession) in April, 1910. The inam was enfranchised in the name of the Karnam in 1911. He brought this suit for possession in 1920 alleging that the mortgage and sale were void.

Held, that though the mortgage of 1907 was void, the mortgagee in possession had prescribed for a mortgagee interest by 1919. 41 M. L. J. 194 followed.

The suit in 1920, if treated as a suit for redemption, was premature as the 15 years had not expired from the mortgage.

But as that period had expired by the date of the decree in appeal, *held,* the Court could take notice of this subsequent event and pass a decree for possession conditional on the plaintiff refunding the mortgage money. (1916) 1 M. W. N. 364 and (1918) M. W. N. 89 and 199 followed.

Held further the plaintiff must also refund the price of the equity of redemption and the value of improvements made by the defendant while in possession.

Held further that the subsequent invalid sale in 1910 did not alter the character of the defendant's possession and that the could not prescribe for an absolute title by the lapse of 12 years from that date. 14 Bom. 279 and 14 Mad. 38 relied on.

Y. Suryanarayana for Appellant.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

Viswanatha Sastri, J.
5th October, 1925. } *C. R. P. No.* 853 *of* 1923.

Contract Act, S. 45—*Joint promissees—Promise to two persons that on their paying in moneys into the treasury and showing receipt to promissor, they would be repaid the money—Payment and showing of the receipts by one of the promissees—Suit by him alone to recover the money—Whether maintainable.*

Where the defendant executed a contract in favour of the plaintiff and another that on their paying in moneys into the treasury on his account and showing the receipts to him he would repay the moneys so paid with interest, and the plaintiff alone made the payment and showed the receipts, *held*, the plaintiff and the other party were not co-promissees within the meaning of S. 45 of the Contract Act. On a true construction of the contract, the promise was to the person or persons making the payment, and not to the plaintiff and the other jointly. The plaintiff's suit was rightly decreed, and was not bad for non-joinder.

L. S. Veeraraghava Aiyar for Petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
6th October, 1925. } *In the matter of a High Court Vakil.*

Letters Patent (Madras), cl. 10—*Negligence—If amounts to professional misconduct.*

Negligence by itself will not amount to professional misconduct unless an element of moral delinquency enters into the transaction alleged. 86 Law Times Reports 468 referred to.

Where owing to the fraud of his clerk, a vakil did not pay into Court certain printing charges, though the client had remitted moneys in due time and as a result the case was dismissed for default, no question of professional misconduct on the part of the vakil arises.

The Advocate-General for the Crown.

P. Venkatramana Rao for the Vakil and *T. R. Ramachandra Aiyar* for the Vakils' Association.

T. S. V.

N R C

The Chief Justice and Viswanatha Sastri, J. *6th October,* 1925. } *A. S. No.* 356 *of* 1924.

Criminal Procedure Code, S. 107—*Petition for binding over —Police enquiry—Dismissal without notice—Suit for damages for malicious prosecution and defamation—Maintainability—Statements made to the Police—Privilege.*

The defendant presented a petition to a Magistrate to take action under S. 107, Criminal Procedure Code, against the plaintiff. The Magistrate sent it to the police for enquiry, who after hearing the defendant reported that the allegations in the complaint were unfounded. The Magistrate thereupon dismissed the petition without even issuing notice to the plaintiff. In a suit by the plaintiff for damages for malicious prosecution and defamation contained in the petition and in the statements to the police, *held,* (1) as there was no prosecution, a suit for malicious prosecution will not be sustainable ; and (2) the statements were privileged and no suit for defamation could be sustained. (1905) A. C. 480 ; 2 Weir 51 ; 1 Lord Raymond 454 ; 35 I. C. 813 ; 40 All. 341 ; 48 Cal. 388 referred to.

Sir K. V. Reddy and *P. V. Rangaram* for Appellant.

S. Ranganatha Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ. *6th October,* 1925. } *S. A. No.* 186 *of* 1923.

Hindu Law—Adoption—Consent of father-in-law—Adoption made long after his death—Consent of sapindas *if to be expressly asked for and obtained—Inference from omission to object.*

A Hindu widow who had obtained the consent of her father-in-law to adopt a son did nothing for a long time and 19 years after his death adopted a son. One of the nearest *sapindas* gave his son in adoption, another took the boy in adoption on her behalf, while two others who knew of what was taking place did not object to the adoption. *Held,* the adoption was valid, and it was not necessary that the consent of the *sapindas* should have been expressly asked for. From their conduct in taking part in the adoption and failing to object when there was knowledge of what was happening, the same can be inferred. Case-law discussed.

P. R. Ganapathy Aiyar and *K. Venkatrama Raju* for Appellant.

S. Varadachari and *P. Bapiraju* for Respondents.

T. S. V.

Odgers and Viswanatha Sastri, JJ. *6th October*, 1925. } *S. A. No.* 444 *of* 1923.

Hindu Law—De facto *guardian—Alienation—Validity—Ratification by minor after attaining majority—Effect of.*

An alienation made by the maternal uncle of a Hindu minor acting as his *de facto* guardian stands on the same footing as an alienation by a *de jure* guardian. It is only voidable and not void. If after attaining majority, the minor ratifies it, the alienation will be binding on him irrespective of whether it was for necessity or not. 6 M. I. A. 393 ; 20 Cal. 820 ; 14 Bom. 562 and other cases referred to.

K. Subba Rao for *V. Ramdoss* for Appellants.

P. Satyanarayana Rao for Respondent.

T. S. V.

Jackson, J. *8th October*, 1925. } *C. R. P. No.* 30 *of* 1925 and *C. M. P. No.* 3199 *of* 1925.

Court Fees Act, S. 7, cl. 9—Suit for redemption and damages—Compensation for improvements claimed by tenant—Malabar Compensation for Tenants' Improvements Act (*I of* 1900), *S. 6—If Court-fee payable on damages claimed—Set-off against improvements—Civil Procedure Code, O. 47, R. 1—If Court can review a wrong decision.*

Where in a suit for redemption of a *kanom*, the plaintiff claimed a large amount by way of damages, exceeding the pecuniary jurisdiction of the Munsiff in whose Court the suit had been filed, and which he claimed to set off against the *kanom* amount and value of improvements claimed by the tenant, and the Court directed the plaintiff to pay Court-fee on the damages claimed and to bring the valuation within the Munsiff's jurisdiction, *held*, no Court-fee is payable in a redemption suit on damages which have to be set off against the value of improvements claimed and no question of jurisdiction arises. 33 M. L. J. 463 ; 25 I. C. 704 ; 5 M. 284 (F. B.) followed.

Where a Court has given a wrong decision, but it has not affected the rights of the parties and the question arising is

one of general importance, it can review its decision. 43 M. L. J. 332 (P. C.) ; 7. M. 307 followed.

K. P. Ramakrishna Aiyar for Petitioner.

A. Parameswara Aiyar for Respondent.

T. S. V.

Spencer, J. *8th October*, 1925.	*S. A. No.* 551 *of* 1921.

Civil Procedure Code, S. 96—Right to appeal—Who is entitled to—Party who has assigned away his rights but continues in possession as lessee:

Where in a suit in ejectment one of the defendants had assigned away his rights over the suit property but continued in possession as a lessee, and a decree was passed against all the defendants, *held*, the assignor-defendant was entitled to prefer an appeal as he was a person in possession and aggrieved by the decree in ejectment.

P. Govinda Menon for *K. P. M. Menon* for Appellant.

K. P. Ramakrishna Aiyar and *K. P. Mahadeva Aiyar* for Respondents.

T. S. V.

Jackson, J. *9th October*, 1925.	*C. M. S. A. No.* 52 *of* 1923.

Civil Procedure Code, O. 21, *Rr.* 22, 90—*Notice under—Service recorded, but later proved not proper—Application to set aside sale—Limitation Act, Arts.* 166, 181.

Where in an execution sale the notice prescribed by O. 21, R. 22 was recorded as served but it subsequently transpired that the service was not properly effected, an application to set aside the sale on the ground of such defect is still governed by the 30 days' period of limitation under Art. 166, Limitation Act and not by Art. 181.

A. Krishnaswami Aiyar for Appellant.

A. V. Viswanatha Sastri for Respondent.

T. S. V.

Phillips, J. } *C. R. P. No.* 1014 *of* 1924.

Civil Procedure Code, S. 141, *O.* 9, *R.* 9—*Dismissal of suit for default—Application to restore suit dismissed for non-payment of batta—Application to restore former application—Whether lies under O. 9, R. 9.*

The plaintiff's suit was dismissed for default on the ground of the non-appearance of the plaintiff and his pleader. An application to set aside the order of dismissal for default was itself dismissed for failure to pay batta. Another application was filed to restore the first application to file. *Held*, in revi-n against the order restoring the petition to file on the nd that O. 9, R. 9 of the Civil Procedure Code does not y to an application that (1) O. 9, R. 9 applies to such an ication and S. 141 of the Civil Procedure Code has ex-led the provisions of the Code, *i. e.*, O. 9, R. 9, to such an lication. 44 Cal. 950 ; 1 Lah. 339 and 18 Bom. 59 cited l approved. 17 All. 106 (P. C.) distinguished. 4 Pat. L. J. 5 (F.B.) ; 1 Pat. L. J. 135 not approved.

P. Satyanarayana Rao for Petitioner.

P. Somasundaram and *P. Satyanarayana* for Respondents.

C. A. S.

Phillips and Ramesam, JJ. } *A. S. Nos.* 144 & 145 *of* 1922 and *A. S. No* 3 *of* 1923.

*Conflict of laws—Submission to jurisdiction—Execution of a power-of-attorney to agent to conduct litigation in foreign Court—Whether amounts to submission—Partnership—Partners removing themselves from the place of business—Whether terminates partnership—Persons invoking jurisdiction of a Court—Not entitled to deny jurisdiction of the Court when sued in a foreign Court—C.P. Code, S.*13—Res judicata—*Assignee of a foreign decree brought on record by foreign Court after finding the assignment was valid—Decision binding upon Indian Courts—Foreign* ex parte *decree—Whether merely on that account one not given on the merits.*

The execution of a power-of-attorney authorising an agent to conduct litigation in a foreign Court is submission to the jurisdiction of that Court. 37 Mad. 163 and 47 Mad. 877 followed.

The mere fact that partners ran away from their place of business does not terminate partnership.

N R C

Where the defendants' firm filed suits in a foreign Court, they cannot be allowed as defendants to deny the jurisdiction which they themselves invoked as plaintiffs. S. A. No. 1492 of 1920 referred to.

Where the assignee of a foreign decree has been brought on record in the foreign Court, the finding as to the validity of the assignment is conclusive on the Indian Courts under S. 13 of the Civil Procedure Code. A foreign decree passed *ex parte* does not merely on that account become a decision not passed on the merits. 47 Mad. 877 approved.

V. Narayanan and *A. Krishnaswami Aiyar* for Appellants.
K. Narasimha Aiyar for Respondents.
C. A. S.

Odgers, J.	}	*C. R. P. Nos. 990 to 999 of 19*

Contract—Consideration—Promise to subscribe for a S gham—Incurring of obligation by the plaintiff on such a prom —Whether the plaintiff can sue and recover on such a promise.

On the strength of the promise made by the defendants subscribe for a Sangham, the plaintiff entered into various obliga tions and incurred expenditure. In a suit brought by the plaintiff for recovery of the amounts promised, it was contended by the defendants that it was a mere voluntary promise not supported by consideration and therefore not enforceable and that the Panchayat Court has no jurisdiction as this is not a claim based on contract.

Held, that even voluntary subscriptions are enforceable as contracts under certain circumstances. 14 Cal. 64; (1918) M. W. N. 173 followed. 36 All. 268 referred to.

R. Kuppusami Aiyar for Petitioner.
S. Nataraja Nadar for Respondent.
C. A. S.

Phillips, J.	}	*C. R. P. No. 908 of 1923.*

Civil Procedure Code, O. 20, R. 4—Judgment of the Court of Small Causes—No reasons given—Whether judgment in accordance with law.

A judgment of the Provincial Small Causes Court which merely records findings on the points for decision without recording any reasons whatever is not one in accordance with law.

C. A. Seshagiri Sastri for Petitioner.

N. S. Srinivasa Aiyar for *M. S. Venkatrama Aiyar* for Respondent.

C. A. S.

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Devadoss and Waller, JJ. } *L. P. A. No. 28 of* 1924.

Evidence Act, S. 116—*Landlord and tenant—Person having no title letting tenant into property—Notice of eviction by real owner—Attornment by tenant to real owner under threat of eviction—Suit in ejectment by the person who originally let tenant into possession—Estoppel.*

Where the plaintiff who had no title to a land let the defendant as tenant into possession of the property and subsequently the Government who was the real owner of the property gave the defendant, the tenant, notice of eviction from the land under S. 6 of the Madras Land Encroachment Act and the defendant under the threat of eviction executes a muchilika to the Government in a suit by the plaintiff to eject the defendant, *held,* that the threat of eviction by the Government who was the paramount owner followed by the attornment of the defendant by the execution of the muchilika constituted a valid eviction of the defendant by title paramount and he is not estopped from questioning the right of the plaintiff to recover the property. The tenant is not estopped under S. 116 of the Evidence Act from questioning the title of the plaintiff to eject. 107 English Reports 113 followed.

S. Muthiah Mudaliar for Appellant.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

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Spencer and Madhavan Nair, JJ. } *C. M. S. A. No.* 140 *of* 1923.

Provincial Insolvency Act, Ss. 20, 51 *and* 52—*Interim Receiver in insolvency—Sale of insolvent's property in execution of a decree—Notice by interim Receiver to the executing Court prior to sale of his appointment—Possession not taken by the interim Receiver prior to sale—Validity of execution sale—Whether Ss.* 51 *and* 52 *apply to interim Receivers.*

Where a sale in execution of a decree against the insolvent takes place notwithstanding the appointment of an interim Receiver of his properties in insolvency and notice given by such

interim Receiver to the executing Court of his appointment in a case where such interim Receiver has not taken possession of the properties, there is no illegality or irregularity in the execution sale and a valid title will pass to the auction purchaser.

Where a Receiver is appointed for certain properties, an execution sale of those properties is valid even though leave of the Court appointing a Receiver is not obtained, in cases where the Receiver has not obtained possession of the properties.

Ss. 51 and 52 of the Provincial Insolvency Act do not apply to the case of an interim Receiver in insolvency.

T. R. Ramachandra Aiyar for Appellant.

T. M. Krishnaswami Aiyar, S. Subramania Aiyar and *C. A. Seshagiri Sastri* for Respondents.

C. A. S.

Odgers and Madhavan Nair, JJ. } *C. M. A. No.* 159 *of* 1923.

Religious endowment—Removal of hereditary trustee for misconduct—Hereditary rights of his son not forfeited.

Where a hereditary trustee of an endowment is removed by a Court for misconduct, the hereditary rights of his son to the trusteeship are not thereby forfeited. 9 M. L. T. 495; 6 M. L. J. 254 followed.

N. R. Govindachari for Appellant.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Jackson, J.

2nd October, 1925. } *C. R. P. No.* 7 *of* 1925.

Civil Procedure Code, O. 21, R. 89—Sale of judgment-debtor's property in execution of money decree—Interim Receiver of the estate of the judgment-debtor appointed in his insolvency prior to sale—Right of interim Receiver to apply under O. 21, R. 89—Provincial Insolvency Act, S. 20,

Where the Official Receiver of Tanjore appointed as Interim Receiver under S. 20 of the Provincial Insolvency Act of 1920 applies without sanction of the Court under O. 21, R. 89 of the Civil Procedure Code to set aside the sale of the properties of the judgment-debtor against whom the petition in insolvency has been filed, which was made in execution of a money decree against him some time before the appointment of the interim Receiver :

Held, that the property of the judgment-debtor does not vest in the interim Receiver under S. 20 of the Provincial Insolvency Act of 1920 and that the mere appointment of a Receiver for the preservation of the property without conferring the powers mentioned under O. 40, R. 1, cl. (*d*) of the Civil Procedure Code cannot entitle the Receiver to apply under O. 21, R. 89.

Held, therefore, that the Receiver cannot be said to be neither the owner of the estate nor can he be said to be a person holding any interest by virtue of a title acquired before sale. 28 Mad. 157 at 160 and 45 Mad. 167 distinguished.

C. V. Anantakrishna Aiyar for Petitioner.

S. Varadachari and *K. Balasubramania Aiyar* for Respondent.

C. A. S.

Od[illegible]
7th October, 1925. } *S. A. No.* 215 *of* 1922.

Suit for possession—Vacant site—Absence of acquisition of title by prescription by defendant—Rule that possession follows title applies.

In a suit for possession of a vacant site, the Court is entitled to presume that possession follows title and the plaintiff will be held to have been in possession within 12 years prior to suit in the absence of proof of title by prescription in the defendant.

Ch. Raghava Rao for Appellants.

N. Rama Rao for Respondents.

C. A. S.

Spencer, J.
8th October, 1925. } *S. A. No.* 350 *of* 1924.

Civil Procedure Code, S. 100—Decree against father—Execution and sale of property—Question whether the father's interest alone in the property passes or the entire interest of the father and the sons—Mixed question of law and fact—Whether sons were parties to suit or execution proceedings a material circumstance in the decision.

The question whether what is sold in execution of a decree against Mitakshara Hindu father is merely the father's interest in the property sold or the entire interest of the father and the sons is a mixed question of law and fact on which it is open to the High Court to interfere in second appeal. 13 M. 247;

36 M. 325 at 339; 27 M. 131 at 142 followed. 71 Cal. 584 at 589 referred to.

Where it is doubtful whether it is the father's interest alone that passed or the entire interest of the father and the sons, it is a material element for consideration whether the sons were parties to the suit or the execution proceedings.

C. A. Seshagiri Sastri for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondents.

C. A. S.

Devadoss and Waller, JJ.
9th October, 1925.
C. M. A. No. 415 *of* 1924.

Provincial Insolvency Act, S. 51—*Deposit of* 25 *per cent. of the sale amount by the execution purchaser prior to the presentation of the insolvency petition—Whether amount deposited is assets realised under the section.*

The 25 per cent. deposit made by an auction purchaser prior to the presentation of an insolvency petition by the judgment-debtor is not assets realised for purposes of S. 51 of the Provincial Insolvency Act.

Ch. Raghava Rao for Appellant.

N. Rama Rao for Respondent.

C. A. S.

Devadoss and Waller, JJ.
9th October, 1925.
L. P. A. No. 90 *of* 1924.

Hindu Law—Joint family—Alienation by de facto *manager*—Bona fide *purchaser—What passes to—Document silent as to what passes—Presumption.*

Where the *de facto* manager of a joint Hindu family alienates joint family property, but there is no recital in the document that what is sold is his own share or any reservation as to the shares of the other members of the family, the interest of the joint family as a whole passes to a *bona fide* purchaser. 34 All. 298 (P. C.) distinguished.

B. Somayya for Appellant.

N. Chandrasekhara Aiyar and *T. Kumaraswamiah* for Respondent.

T. S. V.

Devadoss and Waller, JJ. *9th October*, 1925. } *L. P. A. No.* 106 *of* 1924.

Limitation Act, Art. 182—*Execution application—Order lodging or recording—If proper—Revival—Application when necessary—Joint and several decree—Execution against one—Effect.*

An execution application must be disposed of in one of the ways prescribed by the Code of Civil Procedure. There is no provision in the Code according to which a Court can direct such an application " to be lodged or recorded ". In spite of an order directing the petition to be recorded, the execution application must be deemed to be on the file of the Court, and no application is required to revive it, when it has not been in terms dismissed and no question of limitation arises. Practice of mofussil Courts " recording or lodging execution applications " condemned. 28 Mad. 50 (F. B.); 31 Mad. 71; 36 Mad. 555; (1923) M. W. N. 670 referred to.

Where a joint decree is passed against two persons to deliver up possession, and mesne profits are awarded against them severally with respect to the lands in the possession of each, the execution of the decree for mesne profits against one alone saves limitation for purposes of obtaining possession by execution against the other. 30 Mad. 268; 11 C. L. J. 83 followed.

T. M. Krishnaswami Aiyar and *K. P. Sarvothama Rao* for Appellant.

K. Srinivasa Rao for *B. Sitarama Rao* for Respondent.

T. S. V.

Jackson, J. *13th October*, 1925. } *C. R. P. No.* 770 *of* 1923.

Evidence Act, S. 34—*Suit for balance of accounts—Evidence only of the account book and knowledge of witnesses derived from the same—No decision can be passed for the plaintiff on the evidence.*

Where in a suit brought upon balance of accounts due on dealings had by the defendant with the plaintiff the only evidence let in was that of the plaintiff's account books and one or two witnesses whose knowledge of the transaction was entirely derived from the account books themselves and a decree was passed thereon. *Held*, that there was no legal evidence

to support the decree inasmuch as there was no independent corroborative evidence of the dealings disputed as required by S. 34 of the Evidence Act and the decree should be set aside and suit dismissed.

A. Sundaram Aiyar for Petitioner.

R. Kesava Aiyangar for Respondent.

C. A. S.

Phillips, J.
14th October, 1925. } *C. R. P. No.* 840 *of* 1923.

Indian Contract Act, S 23—Illegality of contract—Agreement to stifle of prosecution—A complaint for compoundable and non-compoundable offences—Notice to accused issued only for compoundable offences—Agreement of parties settling differences.

Where a complaint is made of offences some of which are compoundable and others are non-compoundable and the Magistrate issues a notice after examining the complainant only on the compoundable offences, an agreement between the parties settling their differences is not illegal as an agreement to stifle a prosecution, as there is no prosecution under the circumstances for a non-compoundable offence. 20 C. W. N. 946, followed.

V. Ramaswami Aiyar for Petitioner.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Spencer and Odgers, JJ.
13*th October* 1925. } S. *A. No.* 324 *of* 1922.

Limitation Act, Art. 134—*Transferee from mortgagee—Title acquired—What he should prove.*

In order that a transferee from a mortgagee may establish that he had acquired a title as absolute owner of the properties under Art. 134, Limitation Act, it is necessary for him to establish that he bargained for and obtained from his transferor right as an absolute owner. It is not necessary for him to establish either *bona fides* or good faith in entering into the transaction. 34 M. L. J. 431; (1917) M. W. N. 5; 15 I. C. 609; 14 M.I.A. 1; A. S. No. 182 of 1921 referred to.

C. V. Anantakrishna Aiyar for Appellant.

T. M. Krishnaswami Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

Jackson, J.
13th October, 1925. } C. M. P. No. 3137 of 1925.

Civil Procedure Code, S. 148 and O. 33, Rr. 2 and 5—Schedule of property omitted—Return of application—Representation more than 30 days after decree—Power of Court to extend time.

When an application for leave to appeal *in forma pauperis* does not contain the schedule of property as required by O. 33, R. 2 and the papers being returned for correcting this omission are represented beyond the period of limitation prescribed by Art. 170, Limitation Act, the Court has no power under S. 148, Civil Procedure Code, or otherwise to extend the time for presentation of the application. Where the statutory requirements of O. 33, R. 2 are not complied with, the only course open to the Court is to reject the application 26 M. L. J. 343; 1 L. W. 1068 distd.

T. S. Venkatesa Aiyar for Petitioner.

T. S. V.

Phillips and Ramesam, JJ.
14th October, 1925. } A. S. No. 21 of 1924.

Malabar Law—Karar—Powers of karnavan to borrow restricted—Creditor having knowledge of karar—Adult members to join—Failure to join—Family necessity—Effect of—Contract Act, S. 64—Applicability.

Under the terms of a *karar* in a Malabar *Tarwad*, power was given to the *karnavan* to borrow money to pay a specific debt of Rs. 3000, but it was expressly provided that the interest thereon was to be met out of the current income; also that all the adult members should join in all cases of borrowing. The plaintiff who had full knowledge of the *karar* lent the sum on the security of immoveable properties, being put in possession of the same in lieu of interest; but by a document of even date the properties were leased to the *Tarwad*, rent being made a charge on the property. Subsequently a further sum was borrowed for purposes of litigation, a mortgage document being executed by some only of the adults. The plaintiff sued to recover out of the *Tarwad* properties the moneys due under both the mortgages and also claimed to have a charge on the properties for the arrears of rent that had accrued due. *Held*, (1) the charge for rent created under the lease was not binding on the *Tarwad*. 11 M.L.J. 185; 16 I.C. 560 folld.; (2) that when money

is borrowed for expenses of a *Tarwad* there must be evidence to show that the money was spent for family purposes or that there was such a lack of *Tarwad* money that it was necessary to borrow; (3) the mortgage for litigation expenses was in contravention of the *karar*, as some of the adult members did not join and was not binding on the *Tarwad* properties. Nor was the matter one falling under S. 64, Contract Act. 35 Tr. L. R. 110; S. A. No. 615 of 1882 folld.; 35 M. L. J. 96; 22 Mad. 289; 43 Mad. 793 distd.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

C. V. Anantakrishna Aiyar for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
14th October, 1925. } *C. M. A. No.* 228 *of* 1924.

Guardians and Wards Act, Ss. 34 (*d*) *and* 43 (1)—*Order directing guardian to account for moneys—If appealable.*

Where on a guardian filing in Court accounts for a certain sum of money as representing the moneys of the minor in his hands, the Court orders him to pay into Court a further amount as money which he ought to account for, the order is one falling under S. 43 (1) and not under S. 34 (*d*) of the Guardians and Wards Act and is appealable. 55 I.C. 587; 67 I.C. 309 dissented from; 25 C. L. J. 149 folld.; 46 All. 458 referred to.

C. S. Venkatachari and *V. Narasimha Aiyangar* for Appellant.

S. Muthiah Mudaliar and *M. Krishna Bharati* for Respondent.

T. S. V.

Phillips, J.
14th October, 1925. } *C. R. P. No.* 894 *of* 1923.

Limitation Act, Arts. 161 *and* 181—*Connected suits—One original and the other small cause suit—Joint trial—Decree in original suit reversed in appeal—Effect on small cause decree—Remedy—Limitation.*

On the file of a District Munsiff there were two connected suits, the plaintiff in one being the defendant in the other and *vice versa*. One of the suits was an original suit and the other a small cause suit. The suits were tried together, and both suits were decided in favour of one of the parties. The other

party filed an appeal against the decree in the original suit and being successful therein applied for a review of the decree in the small cause suit. *Held*, the remedy of the party was not by way of review, but by way of application to get a decree in his favour in the small cause suit also, and such application would fall under Art. 181, Limitation Act, and not under Art. 161.

V. P. Karunakaran Nambiar for Petitioner.

Respondent unrepresented.

T. S. V.

Devadoss and Waller, JJ. 15*th October*, 1925. — *C. R. P. No.* 679 *of* 1923.

Civil Procedure Code, O. 9, R. 13—*Applicability*—Ex parte *order directing delivery of property in execution—If can be set aside.*

Where in pursuance of a Court auction sale held in execution of a decree, an *ex parte* order was passed directing delivery of the property, the Court has no jurisdiction to set aside the *ex parte* order under O. 9, R. 13. Proceedings under O. 21, Rr. 97 to 101 are execution proceedings and the provisions of O. 9, Civil Procedure Code, are inapplicable to them. Case-law and the conflict therein discussed.

C. S. Venkatachari for Petitioner.

L. S. Veeraraghava Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. 19*th October*, 1925. — *O. P. No.* 212 *of* 1924.

Indian Majority Act, S. 3—*Guardian appointed on condition of giving security—Failure to give security—Age of majority if extended—Suspensory orders—Practice—Madras Civil Rules of Practice, Rr.* 240 *to* 242—*If* ultra vires.

On an application for the appointment of a guardian, the Court passed an order in these terms : "Upon furnishing security for the amount of Rs.— X is appointed guardian of the minor." X did not furnish security within the time fixed, and subsequently another application was put in for the appointment of a guardian. The minor had then attained the age of 18 years and the question was whether the prior order had the effect of extending the period of minority up to the age of 21. *Held*, a suspensory order of appointment, taking effect only on the giving of security is unwarranted by law, being contrary to S. 34 of the Guardians and Wards Act, and the order being wholly

bad, the person attained majority on attaining the age of 18. 40 Mad. 775 dissented from; view of *Sadasiva Aiyar, J.* in 30 M. L. J. 508 followed; 4 C. L. J. 112 referred to.

Rules 240 to 242 of the Madras Civil Rules of Practice are *ultra vires* and the practice of passing suspensory orders should be discontinued. Procedure to be followed laid down.

V. Radhakrishnayya for Petitioner.

T. S. V.

Devadoss and Waller, JJ.
20th October, 1925. — *Cr. R. C. No.* 175 *of* 1925.

Penal Code, Ss. 467, 471—*Title to land—Using as genuine a forged document—Fraud—Meaning of—Detriment if necessary.*

Where a person uses as genuine a forged document to support his title to a disputed piece of land, he commits an offence under Ss. 467 and 471, Indian Penal Code, even though he might succeed in his claim to that property under a different title, *e.g.*, adverse possession. 9 Cal. 53; 83 I. C. 584 folld.; (1915) M. W. N. 278 dissented from.

The scope and meaning of the terms "fraudulently" and "dishonestly" in S. 464 discussed. The term "fraud" does not mean deceit followed by some detriment and it is not necessary that there should be a deprivation of property or some detriment. 13 Bom. 515; 21 All. 113; 28 Mad. 90; 41 Mad. 589 referred to.

F. S. Vaz for Petitioner.

The Public Prosecutor and *K. V. Srinivasa Aiyar* for Respondents.

T. S. V.

Jackson, J.
20th October, 1925. — *C. R. P. No.* 800 *of* 1923.

Provincial Small Cause Courts Act, S. 23—*Plaint returned under—Decree—Nature of—Appeal.*

Where a plaint filed in a Small Cause Court is returned under S. 23 in order to be presented to a Court having jurisdiction to determine questions of title to immoveable property involved therein, the decree passed in the suit is not a small cause decree and is appealable. 33 Mad. 323 (F. B.) distd.; 45 I. C. 645; 10 M. L. J. 313 folld.

Watrap S. Subramania Aiyar for Petitioner.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. 20*th October*, 1925. } C. S. *No.* 720 *of* 1925.

Madras High Court Original Side Rules, Ch. VI-A—Applicability—Suit on promissory note against executor of promisor.

The summary procedure prescribed by Chapter VI-A of the Original Side Rules applies to a suit by the payee of a promissory note against the executor of the deceased promisor, and such a suit can be filed only in the manner prescribed thereunder.

N. Chandrasekhara Aiyar for Plaintiff.

K. S. Narayana Aiyangar (*amicus curiae*) for Defendant.

T. S. V

Devadoss and Waller, JJ. 20*th October*, 1925. } *L. P. A. No.* 27 *of* 1924.

Evidence Act,* S. 112—*Legitimacy—Presumption of—Conception during continuance of prior marriage—Birth after divorce and re-marriage—Hindu Law—Maravars—Applicability.

A child born to a *Maravar* woman was conceived at a time when she was the wife of X. She was subsequently divorced and within a few months of her marriage to Y the child was born. *Held,* in the absence of proof that Y had no access to the mother at the time the child could have been begotten, the presumption under S. 112, Evidence Act, applies and the child must be treated as the legitimate child of Y. English Law on the subject considered. The Hindu Law as laid down in *Manu* and the ancient texts is not applicable in its entirety to *Maravars.* 47 Mad. 706 : 47 M. L. J. 155 affirmed.

L. A. Govindaraghava Aiyar and *P. S. Narayanaswami Aiyar* for Appellant.

K. V. Krishnaswami Aiyar for Respondent.

T. S. V.

The Chief Justice. 21*st October*, 1925. } *Cr. Appeal No.* 318 *of* 1925.

The Criminal Tribes Act,* S. 23—*Construction—Computation of conviction—Date of registration as member of criminal tribe—If crucial test.

On a reference under S. 429, Cr. P. Code, arising out of a difference of opinion between their Lordships *Devadoss* and

Waller, JJ. as to the construction of S. 23, Criminal Tribes Act, regarding the computation of the number of prior convictions of an accused person registered under the Act, *held*, by the *Chief Justice* (agreeing with *Waller, J.*) all convictions prior to 1st March, 1911, should be counted as one and convictions subsequent thereto counted as separate convictions irrespective of whether at the time of the conviction the accused had been registered as a member of a criminal tribe.

Per Devadoss, J.—The proper mode of construction is to count all convictions prior to registration as one conviction and subsequent convictions as separate.

P. K. Chari (amicus curiae) for Accused.

The Public Prosecutor for the Crown.

T. S. V.

The Chief Justice and Viswanatha Sastri, J. 22nd *October*, 1925. } *A. S. No.* 436 *of* 1922.

Hindu Law—Debts—Commercial debt contracted by father—If binding on son—Text of Gautama—Obsolete.

The text of *Gautama* which includes a commercial debt in the category of *avyavyaharika* debts has become obsolete, and a Hindu son is liable for such a debt contracted by his father.

A. Satyanarayana for Appellants.

G. Lakshmanna and *V. Viyanna* for Respondent.

T. S. V.

Devadoss, J. 23rd *October*, 1925. } *S. A. No.* 705 *of* 1923.

Malabar Law—Moplahs of South Malabar—Law governing—Alienee from person describing herself as Karnavathi of a Moplah tarwad—Suit for redemption and partition—Title—Proof of—Allegation and proof of custom.

The equity of redemption in a share of a house was sold by its owner to a *Moplah* lady X of South Malabar described in the sale deed as the *Karnavathi* and manager of a certain *tarwad*. After the death of X, Y describing herself as the then *Karnavathi* and manager of the *tarwad* sold the equity of redemption to the plaintiff who sued for redemption and partition. Y was not an heir of X under the Mahomedan Law. The plaint contained an account of these transfers and mentioned the recitals in the sale deeds referring to the *Karnavathis* of the *tarwad* but did not contain any allegation that the *tarwad* followed *Marumakkatayam*

Law. Nor was there any proof of such a custom in variation of the Mahomedan Law. *Held*, as the plaintiff's right to redeem depended on a transfer to him by a person who was competent to sell, he could not succeed in the absence of a specific allegation followed by proof that the *tarwad* was following *Marumakkatayam* Law and not the *Mahomedan* Law which would ordinarily apply.

B. Pocker for Appellant.

T. S. Viswanatha Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
27th October, 1925.

S. R. No. 5433 *of* 1925.

Civil Procedure Code, O. 41, R. 22—Original Side appeal—Memorandum of cross-objections—If lies.

The provisions of O. 41, R. 22 apply to appeals from the Original Side of the High Court and a memorandum of cross-objections can be filed in such an appeal. 48 I. A. 76 applied; 48 M. L. J. 384 overruled.

V. Radhakrishniah and *K. S. Narayana Aiyangar* for Petitioner.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
27th October, 1925.

C. C. C. Appeal No. 67 *of* 1922.

Easements Act, S. 15—Property claimed as owner—Easement right if can be decreed—Animus.

Where the claim of a person to a plot of land is dismissed, it is still open to him to claim an easement over the same, provided he proves that for the period fixed in S. 15 of the Easements Act he has been in enjoyment of the easement right as such. The question of *animus* is one of fact.

The principles laid down in English cases as to the acquisition of such easement apply to India, and some of the observations in 38 Mad. 1 being in conflict with (1915) A. C. 599; (1914) 3 K. B. 911 and 17 Ch. D. 535 cannot be supported.

S. Doraiswami Aiyar and *A. Raghunatha Rao* for Appellant.

P. Satyanarayana for Respondents.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. *28th October*, 1925. — *L. P. A. No.* 35 *of* 1924.

Limitation Act, Arts. 62, 115 *and* 120—*Company—Shareholder—Suit for dividends—Period of limitation.*

A suit by a shareholder for the amount of dividend due to him is governed neither by Art. 62 nor Art. 115, but by Art. 120 of the Limitation Act.

The term "registered" in Art. 116 has reference only to the Registration Act and does not refer to registration under the Companies Act. 42 Mad. 33 overruled.

K. N. Rajagopala Sastri for Appellant.

P. Satyanarayana Rao for Respondent.

T. S. V

Devadoss and Waller, JJ. *28th October*, 1925. — *C. R. P. No.* 262 *of* 1924.

Estates Land Act, Ss. 171, 172—*Decision of the Board of Revenue—High Court—Jurisdiction to interfere in revision—Enhancement of rent—Proceedings under Ch. XI.*

The High Court has jurisdiction to interfere in revision with orders passed by the Board of Revenue under Ss. 171 and 172 of the Estates Land Act, the proceedings of the Board being judicial proceedings. Case-law discussed.

In settling a fair rent under Ch. XI of the Estates Land Act the power of the revenue authorities is not confined to or restricted by the provisions of Ch. III of the Act and hence in a proper case rent can be enhanced by more than 2 annas in the rupee.

Where the order passed by the Board of Revenue was based on a wrong assumption of the law, and the party aggrieved had no remedy by suit or otherwise, the High Court will exercise its powers of revision and superintendence.

V. Ramadoss and *K. Ramamurthi* for Petitioner.

The Government Pleader, A. Venkatrayaliah and *L. Venkatanarasiah* for Respondents.

T. S. V

Devadoss and Waller, JJ. *28th October*, 1925, — *L. P. A. No.* 158 *of* 1924.

Limitation Act, Arts. 134 *and* 144—*Religious trust—Sale by trustee—Successor suing for possession—Limitation.*

A suit by the trustee of a temple to recover possession of temple properties improperly sold by his predecessor is not governed by Art. 134, Limitation Act. Where the suit is instituted within two years of his becoming a *pujari* trustee, it is within time, though the sale took place more than 12 years previously. Case-law discussed. 48 M. L. J. 114 affirmed.

T. R. Ramachandra Aiyar and *N. P. Narasimha Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar* for Respondent.

T. S. V

Spencer and Odgers, JJ.
28th October, 1925. } *S. A. No.* 751 *of* 1924.

Limitation Act, Art. 11-*A.—Purchaser of share of joint family property—Delivery proceedings—Adverse order under* O.21, *R.* 101 *—Suit challenging—Failure in—Subsequent suit for partition and possession of share—If barred.*

The purchaser of a share of joint family properties in Madras being obstructed in getting delivery and failing in the delivery proceedings under O. 21, Rr. 95, etc., filed a suit under O. 21, R. 103 to challenge the order passed against him under R. 101. The suit was dismissed on the ground he was not entitled to joint possession. More than one year after the order under O. 21, R. 101 he filed another suit for partition and possession of his share. *Held,* (1) the suit was not barred under Art. 11-A of the Limitation Act; (2) there was no bar either under S. 11 or under O. 2, R. 2; and (3) the scope of the suit was quite different from that in the prior litigation. 19 A. L. J. 53; 24 C. W. N. 1031 (P. C.); 7 N. W. P. 113; 26 Bom. 146 distd.

Under the Mitakshara Law prevalent in Madras, such a purchaser has no right to joint possession, but must work out his rights by suing for partition.

P. R. Srinivasan for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V

Spencer and Odgers, JJ.
28th October, 1925. } *S. A. No.* 572 *of* 1923.

Contract—Breach—Suit for damages—Repudiation by defendant—If can afterwards object to breach by plaintiff.

The rule of law laid down in *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K.B. 543 that the repudiation of a contract by a vendee defendant absolves the vendor from performance of the conditions which he would otherwise have to allege and prove before suing to enforce the contract or for damages for breach thereof, is still good law in England. (1923) A. C. 48 ; 127 L. T. 267 ; 49 M. L. J. 1 ; 20 L. W. 725 referred to.

K. B. Venkatachela Aiyar (for *C. V. Anantakrishna Aiyar*) and *C. V. Harihara Aiyar* for Appellant.

M. Patanjali Sastri (for *A. Krishnaswami Aiyar*) for Respondent.

T. S. V

The Chief Justice, Krishnan and Beasley, JJ.
29th October, 1925.

C. M. A. No. 346 *of* 1922.

Civil Procedure Code, S. 2 (2), *O.* 22, *Rr.* 3 *and* 4—*Application to be impleaded as legal representative—Sole claimant—Order dismissing application—If appealable.*

Where a person applies under O. 22, R. 3 to be brought on record as the legal representative of a deceased plaintiff and the same is dismissed at the instance of the defendant, though there is no rival claimant, the order of dismissal is not appealable. It is not an appealable order under O. 43, nor does it amount to a decree.

V. C. Veeraraghava Aiyangar (for *K. Bhashyam Aiyangar*) for Appellant.

S. Nagaraja Aiyar for Respondent.

T. S. V

The Chief Justice, Krishnan and Beasley, JJ.
29th October, 1925.

Ref. Case No. 3 *of* 1925.

Income Tax Act (*XI of* 1922), *S.* 2—*Professional tax paid—If an item of deduction—Taxable income.*

Professional tax paid under S. 3 of the Madras City Municipal Act cannot be allowed as a deduction in computing the taxable income of an assessee. Nature of professional tax considered.

M. Patanjali Sastri for the Commissioner of Income-tax.

R. N. Aingar for the Assessee.

T. S. V

The Chief Justice and Viswanatha Sastri, J. | A. S. No. 202 of 1923.
30th October, 1925.

Contract—Sale of goods—Advance paid—Breach—Suit for refund of advance paid—Interest—Power of Court to award.

On account of the conflict of judicial opinion in India, their Lordships referred to a Full Bench the question whether in a suit by a vendee for refund of the advance which he had paid under a contract for sale of goods, after the contract had fallen through, the Court had power to award interest on such advance amount.

A. Krishnaswami Aiyar and *N. Chandrasekhara Aiyar* for Appellants.

S. Varadachariar and *K. V. Sesha Aiyangar* for Respondents.

T. S. V

Phillips and Odgers, JJ. | A. S. No. 226 of 1924.
30th October, 1925.

Transfer of Property Act, S. 84—Mortgagor depositing money in Court—Refusal of mortgagee to draw out—Money subsequently taken out by mortgagor—Interest—If ceases to run.

Their Lordships referred to a Full Bench the question whether in a case where the mortgagor deposits in Court the money due to the mortgagee and after the latter refuses to accept the amount, the same is drawn out by the mortgagor, his liability to pay interest ceases.

K. S. Krishnaswami Aiyangar for Appellants.

N. S. Srinivasa Aiyar and *S. V. Narayana Aiyar* for Respondents.

T. S. V.

Odgers and Madhavan Nair, JJ. | S. A. No. 787 of 1923.
2nd November, 1925.

Malabar and Aliyasantana Law—Junior member—Marriage expenses—If binding on family—Maintenance—Generic term.

The marriage expenses of the junior member of an *Aliyasantana* or *Marumakkatayam Tarwad* are to be met by the family, provided there are adequate funds and they can afford the same. The maintenance right which every junior member has is very comprehensive in its scope, including not

only food, but education, medical expenses, etc., and there is no real ground to exclude marriage expenses. The nature and constitution of *tarwads* and the rights of members discussed with elaborate reference to case-law.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

T. S. V

The Chief Justice.
2nd November, 1925. } *C. R. P. No.* 426 *of* 1924.

Madras Estates Land Act*, S. 186—*Purpose of acquisition—Certificate of Collector—Conclusive nature of—Good of the estate—What is.

Under S. 186 of the Madras Estates Land Act it is for the Collector to decide whether the purpose for which the land-holder wishes to acquire land is reasonable and sufficient. The certificate of the Collector is conclusive on the question and the Civil Court cannot go behind it. It is for the Civil Court to judge of the relation of the purpose to the good of the holding or of the estate. "Good of the estate" does not mean the good of the whole estate, but the more equitable distribution of irrigation facilities among some of the ryots of the estate may be for the good of the estate.

P. Somasundaram for Petitioner.

K. N. Rajagopala Sastri for Respondent.

T. S. V

Spencer, J.
2nd November, 1925. } *S. A. No.* 480 *of* 1923.

Transfer of Property Act*, S. 53—*Settlement by a husband in favour of his wife and children—No creditors then—Subsequent creditor if entitled to question the same as fraudulent—Presumption.

Although a subsequent creditor may in certain circumstances be entitled to impeach an alienation made before his debt came into existence, there is no presumption under S. 53, Transfer of Property Act, that an alienation or settlement was in fraud of creditors because it has the effect of defeating the claims of subsequent creditors. 33 M. 205; 38 M. 1071 referred to.

K. P. Ramakrishna Aiyar for Appellant.

P. G. Krishna Aiyar for Respondent.

T. S. V.

The Chief Justice.
4*th November*, 1925. } *C. R. P. No.* 149 *of* 1925.

Civil Procedure Code, O. 33, *R.* 5 (*e*)—*Mortgage executed by applicant—Loan for the purposes of suit—Effect of.*

An application for leave to appeal *in forma pauperis* must be rejected if it is proved that any other person has obtained an interest in the subject-matter of the appeal by virtue of a mortgage deed executed by the applicant. O. 33, R. 5 (*e*) will apply even if the money is borrowed for the purposes of the suit and not the appeal.

T. L. Venkatrama Aiyar for Appellant.

P. V. Krishnaswami Aiyar for Respondent.

T. S. V

Jackson, J.
4*th November*, 1925. } *C. R. P. No.* 198 *of* 1924.

Civil Procedure Code, Ss. 7, 95—*Small Cause Court—Power to award compensation—Arrest before judgment.*

A Small Cause Court has got jurisdiction to award compensation for an improper arrest before judgment.

S. T. Srinivasagopalachari for Petitioner.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Spencer, J.
4*th November*, 1925. } *S. A. No.* 71 *of* 1923.

Temple—Trustee executing bond—Binding purpose—Decree against properties—If can be given.

One of three trustees of a temple executed a bond in favour of the plaintiff. The money was borrowed for purposes binding on the temple but no charge was created over temple property or a promise given to pay it out of temple funds. In a suit on the bond, *held*, (1) no decree could be passed against the temple properties. 32 M. L. J. 259 ; 13 L. W. 323 followed ; 43 Mad. 795 and 45 Mad. 703 distinguished ; and (2) the bond having been executed by one only of the three trustees was not binding on the trust. 27 Mad. 92 ; 42 M. L. J. 113 ; 5 C. L. J. 337 followed.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for Appellants.

N R C

S. Muthiah Mudaliar and *K. Narasimha Aiyangar* for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
5th November, 1925.

C. M. A. No. 269 *of* 1925.

Guardians and Wards Act, Ss. 34, 45—*Moneys of minor given on promissory notes—Order of Court to realise—Failure to obey by guardian—Penalty for contumacy.*

Moneys of a ward of Court were outstanding on promissory notes and the Court passed an order directing the guardian to realise such moneys. He failed to do so, whereupon the Court imposed on him penalty for contumacy under S. 45 (1) (*b*), holding that he had failed to carry out the obligation cast on him by S. 34 (*c*) and (*d*). *Held,* S. 34 (*c*) and (*d*) would not apply, and it is only as regards cash in his hands that he can be asked to pay into Court. The order under S. 45 (1) (*b*) was therefore improper. 25 C. L. J. 149 ; 20 C. W. N. 663 ; 46 All. 458 referred to.

K. Rajah Aiyar for Appellant.

T. M. Ramaswami Aiyangar for Respondent.

T. S. V

Wallace and Madhavan Nair, JJ.
6th November, 1925.

L. P. A. No. 143 *of* 1924.

Madras Estates Land Act, S. 3 (2) (*c*)—*Jagir—What is—Reference to by Inam Commissioner—" Unsettled "—If refers to jagir.*

In a suit by the plaintiffs for a declaration that they were entitled to occupancy rights in certain villages, it was proved that the villages when originally granted to the ancestors of the defendant were called " jagir " and the same nomenclature was adopted by the Inam Commissioner in subsequent proceedings. *Held,* though the mere fact of a village being called a *jagir* did not constitute it an estate within the meaning of S. 3 (2) (*c*) of the Estates Land Act, yet the grant coupled with the subsequent proceedings of the Inam Commissioner showed it was a *jagir* within the meaning of S. 3 (2) (*c*) and hence the tenants when the Act came into force had occupancy rights conferred on them.

Nature and incidents of a *jagir* adverted to ; Baden-Powell's Land Systems in British India, Vol. I, pp. 189,257; 46 Cal. 683 ; 40 Mad. 664 referred to.

The term *jagir* in S. 3 (2) (*c*) is not limited to *jagirs* granted before the advent of the East India Company ; and the adjective " unsettled " qualifies *jagir* as well as *palayam*.

Semble : The settlement referred to in the clause includes not only the Permanent Settlement but also one under the Inam rules. 15 M. L. T. 277 referred to.

A. C. Sampath Aiyangar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ
10th November, 1925.

S. A. No. 1076 *of* 1922.

Natural rights—Upper and lower lands—Surface water—Flow of—Right to prevent water flowing on to lower land.

In the case of adjacent agricultural lands in a village belonging to two different owners, and one of which is higher than the other, the owner of the lower land has no right to prevent surface water falling on the upper land from flowing naturally on to the lower land by raising bunds or otherwise. 113 L. T. 55 ; (1893) 1 Ch. 691 ; 137 E. R. 205 ; 49 M. L. J. 282 followed. 29 Mad. 539 ; (1910) M. W. N. 545 overruled.

V. Suryanarayana for Appellant.

B. Satyanarayana for Respondent.

T. S. V

The Chief Justice.
10th November, 1925.

S. A. No. 481 *of* 1923.

Limitation Act, Art. 177—*Period of limitation under—Effect of Act XXVI of* 1920.

His Lordship referred to a Full Bench the question whether the period of limitation under Art. 177 of the Limitation Act remained at six months even after the amending Act XXVI of 1920.

P. R. Srinivasan for Appellant.

S. Ramaswami Dikshit and *L. A. Gopalakrishna Aiyar* for Respondent.

Spencer and Venkatasubba Rao, JJ.
12th October, 1925.

A. S. No. 330 *of* 1923.

Civil Procedure Code, S. 34—*Decree for unliquidated damages—Interest between date of suit and date of decree—Discretion of Court.*

In the case of a claim for unliquidated damages, interest from the date of the plaint up to the date of decree is entirely a matter of discretion for the Court. Subordinate Courts should give reasons for the exercise of their discretion one way or the other, but the case of the High Court is different. 39 C. L. J. 77 followed ; 60 I. C. 288 dissented from.

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar* for Appellant.

N. Rama Aiyar for *P. N. Marthandam Pillai* for Respondent.

T. S. V

Devadoss and Waller, JJ.
13*th November*, 1925.

C. M. A. No. 20 *of* 1923.

Civil Procedure Code, S. 92—*Scheme framed—Liberty given to persons interested to apply in respect of matters arising out of scheme—Clause* ultra vires—*Application by archaka for salary—If maintainable.*

Where the scheme framed by a Court with respect to a temple contained a general clause giving liberty to persons interested to apply to the Court in respect of any matter arising out of the scheme or any modification thereof, the provision is *ultra vires.* The *archakas* of a temple cannot apply to the Court under such a provision for the salary due to them. 49 M. L. J. 225 (P. C.) ; 20 L. W. 687 followed ; 28 Mad. 319; 24 Bom. 45 held to be bad law.

A. Satyanarayana for Appellant.

V. Suryanarayana for Respondent.

PRIVY COUNCIL.

CORAM : *Lord Shaw, Lord Phillimore,* and *Sir John Edge.*

29th October.—*Thakur Pyarsingh* v. *Sona Bahuji and others* (Central Provinces—Appeal No. 141 of 1924).

This appeal raised the question as to whether, on the 9th November, 1918, the 3rd respondent was adopted by Yeshwant Singh, deceased proprietor of the Mandhata estate, possession of which was claimed by the appellant, and refused him by the Court of the Judicial Commissioner.

L. de Gruyther, K. C. and *J. M. Parekh* for Appellant.

Sir G. Lowndes, K. C. and *M. R. Jardine* for Respondents.

Appeal dismissed.

29th October.—*Kumar Kalikanand Singh and others* v. *R. Prasad Singh and others* (Patna—Appeal No. 41 of 1924).

These two consolidated appeals arise out of two suits brought by the respondent in 1914 on two mortgages of ancestral property made in July, 1904, and November, 1912, respectively, by the managing members of the family, on which both Courts in India had decreed a sale. The appellants (sons of the mortgagors) contended that the mortgages were not beneficial to the family, nor made under circumstances rendering them binding thereon, and also that there was separation between the brothers (mortgagors) prior to July, 1904.

L. de Gruyther, K. C. and *W. Wallach* for Appellants.

Sir G. Lowndes, K. C. and *K. Brown* for Respondents.

Appeal dismissed.

CORAM : *Lord Shaw, Lord Phillimore, Sir John Edge* and *Mr. Ameer Ali.*

30th, 2nd and 3rd November.—*Jawahir Singh* v. *Udai Parkash and others* (Allahabad—Appeal No. 22 of 1924).

The respondents here claimed recovery of joint family property sold by their father in 1906 to Dalip Singh, from whom the appellants derived title, on the ground that the sale was not justified by family necessities or Hindu Law. The claim was opposed on the ground of limitation.

B. Dube for Appellant.

Judgment reserved.

N R C

30th, 2nd and 3rd November.—*Man Singh* v. *Nawlakhbati and another* (Patna—Appeal No. 94 of 1924).

In December, 1918, the two widows of Maharaja Harballav Singh (owner of the Sonbarsa estate, Bhagalpur, who was assassinated on the 1st April, 1907) executed a deed surrendering their joint life-interest in the estate, thus accelerating the vesting of the estate in the immediate reversioners. The appellant claims, by reason of the surrender, possession of half the estate from the junior widow (2nd respondent), and his claim is resisted on the ground that the deed is invalid (*i*) under S. 60 of the Bengal Court of Wards Act (IX of 1879); (*ii*) because made by *purdanashin* women, to whom it was not properly explained.

L. de Gruyther, K. C. and *S. Hyam* for Appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondents.

Judgment reserved.

CORAM : *Lord Dunedin, Lord Sumner* and *Sir John Edge.*

2nd November.—*V. M. Abdul Rahman* v. *King-Emperor* (Burma).

The petitioner was convicted on the 1st June, 1925, at Rangoon before H. S. Sitzle, District Magistrate, on two charges under Ss. 466—109 and Ss. 466—116, Penal Code, and sentenced to two years' rigorous imprisonment, which was reduced on appeal to 9 months. He now prayed for Special Leave to appeal because—

1. Between the hearing of the appeal and the judgment thereon, the Magistrate, at the request of the Judges of the High Court, furnished them with a report—uncommunicated to the petitioner or his legal advisers—upon certain questions of procedure arising at the trial, and forming one of the grounds of appeal. Such report was adverse to the petitioner's contentions, and though his Counsel had no opportunity of commenting on it, it was adopted and cited *seriatim* by the Judges of appeal in their judgment.

2. Prior to the report, the Magistrate had an interview with one of the Judges at which neither the petitioner nor his legal advisers were or were invited to be present.

3. The charges, trial and appeal were had in a manner which violated Ss. 191, 233 and 360-361, Criminal Procedure Code.

4. Inadmissible evidence was admitted, necessary expert evidence excluded, accomplices' evidence accepted without corroboration, and both Courts had misdirected themselves on the question of the petitioner's motive.

Sir John Simon, K. C., K. N. Chaudhuri and *D. Frampton* for Petitioner.

K. Brown for Respondent.

Leave granted.

A. de M.

HIGH COURT.

Jackson, J.
6th November, 1925.

Cr. Rev. Case No. 229 *of* 1925.

Criminal Procedure Code, S. 247*—Acquittal—Complainant not present at adjourned hearing—Duty of Court.*

In a summons case, the accused was acquitted under S. 247, Criminal Procedure Code, on the ground that the complainant did not appear when the case was called at 12 noon on the adjourned day fixed for examining witnesses. He, however, appeared later before the order of acquittal was signed and delivered. *Held* (1) the order of acquittal and the refusal to go on with the trial amounted to a refusal to exercise jurisdiction and was bad ; (2) S. 247 mentions only "day" and not "hour" and a Court is not bound to acquit if the complainant does not appear when called, but only later in the day 7 Mad. 356 distd. ; and (3) penal provisions should be construed liberally.

V. L. Ethiraj and *P. V. Krishnaswami Aiyar* for Petitioner.

The Public Prosecutor and *A. Srirangachari* for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
9th November, 1925.

C. M. A. No. 447 *of* 1924.

Civil Procedure Code, Ss. 47 *and O.* 21, *R.* 58*—Claim petition—Defendant against whom decree satisfied—Order—If appealable—*Locus standi *to plead bar of limitation.*

In execution proceedings, a defendant as against whom the decree had been satisfied filed a claim petition under O. 21, R. 58 alleging that the property attached was his and that execution was barred by limitation. The Court held that he had no *locus standi* to raise the plea of limitation. *Held,* the matter being one under S. 47, Civil Procedure Code, the order was appealable. 39 M. L. J. 603 ; 5 L. W. 701 ; 41 M. L. J. 54

referred to; also that the claimant was entitled to raise a plea of limitation.

K. G. Srinivasa Aiyar for Appellant.

M. S. Ratnasabapathi Mudaliar for Respondent.

T. S. V

Devadoss and Waller, JJ.
13th November, 1925. } *C. M. S. A. No.* 91 *of* 1924.

Civil Procedure Code, O. 21, *R.* 16—*Decree for the payment of money—Mortgage decree if a decree for money.*

A mortgage decree is not a decree for the payment of money within the meaning of the second proviso to O. 21, R. 16. It is only when a personal decree is passed in a mortgage suit that it becomes a decree for money within the meaning of that section. 43 M. L. J. 761 ; 28 Mad. 473 distd. ; 47 M. L. J. 434 ; 14 C. L. J. 639 folld.

A. V. Viswanatha Sastri for Appellant.

V. Ramaswami for *C. Padmanabha Aiyangar* for Respondent.

T. S. V

Devadoss and Waller, JJ.
13th November, 1925. } *L. P. A. No.* 74 *of* 1924.

Hindu Law—Will—Construction—Estate tail—Validity of.

The will of a Hindu adopted son made a devise of his properties to his natural father and his male heirs and then followed directions that the aforesaid natural father or heirs should maintain the adoptive mother during her life, perform the funeral obsequies of herself and himself and lastly that the aforesaid natural father and his heirs should take the family house with rights of gift, alienation and all other rights. *Held*, affirming the judgment of *Phillips, J.* that there was only one devise, that the words created an estate tail, that the devise was not to the natural father alone, but to him and his male heirs and being an estate unknown to Hindu Law was void. The effect was to give an estate for life alone to the natural father of the testator. Jarman on Wills, p. 580; 98 E. R. 1387 folld.

K. V. Krishnaswami Aiyar and *K. Rajah Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Respondent.

T. S. V

PRIVY COUNCIL.

Petitions for Special Leave to Appeal.

CORAM :—*Lord Dunedin, Lord Sumner* and *Sir John Edge.*

26th October.—(1) *Anandrao G. Phanse* v. *The King-Emperor.*

(2) *Shafi Ahmed Wali Ahmed and others* v. *The King-Emperor* (Bombay).

These two petitions from the prisoners convicted on the 23rd March last before Crump, J. and a Special Jury (of having, on the 12th January, engaged in an attack on A. K. Bawla, the paramour of Mumtaz Begum, in pursuance of a conspiracy to kidnap her from British India, and in the act murdered the said A. K. Bawla, and seriously wounded Mumtaz Begum, Lieut. Saegert, and K. E. Matthew) prayed for Special Leave to appeal on the ground that—(*i*) the great public prejudice engendered against them in Bombay by the Press prior to the trial, and the refusal by H. E. the Viceroy to remove the venue from Bombay, had prevented a fair trial ; (*ii*) the identification of the prisoners as the real culprits by the witnesses was unsatisfactory ; (*iii*) the weight of the evidence was against the verdict.

Sir J. Simon, K. C., Sir G. Lowndes, K. C., J. M. Parekh and *M. R. R. Pillai* for Petitioners.

A. M. Dunne, K. C. and *K. Brown* for Respondent.

Both dismissed ; reasons to be given later.

26th October.—*Indar Singh and another* v. *King-Emperor* (Lahore).

Petitioner 1 was sentenced to death, and Petitioner 2 (by reason of his youth) to transportation for life, for having, on the 9th October, 1923, murdered Thola Singh, and they now submitted that—(*i*) certain " confessions " given in evidence against them were inadmissible as having been made while in Police custody (S. 26, Evidence Act), and not recorded in strict accordance with Ss. 164 and 364, Criminal Procedure Code; (*ii*) their re-arrest and trial by order of the District Magistrate, Ferozepore, after their discharge by the First Class Magistrate, was an illegality.

W. Wallach for Petitioners.

K. Brown for Respondent.

Dismissed.

N R C

26th October.—*Pakhar Singh* v. *King-Emperor* (Lahore).

Petitioner, who was convicted on the 23rd March last of the murder of Khem Singh and his wife, Chand Kour, alleged as grounds of his application for Special Leave that—(*i*) the statements of bystanders were inadmissible in evidence; (*ii*) the statements and records made in the course of a Police investigation under S. 162, Criminal Procedure Code, were also inadmissible.

Sir G. Lowndes, K. C. and *J. M. Parekh* for Petitioner.

K. Brown for Respondent.

Dismissed.

CORAM: *Lord Dunedin, Lord Wrenbury* and *Sir John Edge.*

27th October.—*Wali Mohamed and others* v. *Mohd. Bakhsh and others* (Lahore).

The petitioners were sued in 1920 as assignees of a mortgage of 1880 for redemption of the mortgaged land, and pleaded in defence that, prior to the Settlement of 1891, the mortgagors had conveyed to them the equity of redemption, thus making them the absolute owners of the land, and mutation of title had been duly effected under the Punjab Land Revenue Act (XVII of 1887). Some of the records had been destroyed in the riots of 1919, but those remaining supported, in the opinion of the Sub-Judge, Sheikurpura, this defence, but the District Judge on appeal reversed his decision and decreed the suit, refusing a certificate of appeal to the Privy Council on the ground that "in effect, inferences drawn from entries in the Records of Rights and Settlement records were questions of fact, and could not be examined by the Court in second appeal". The defendants accordingly now applied for Special Leave to appeal.

L. de Gruyther, K C. and *W. Wallach* for Petitioners.

Granted.

A. de. M.

HIGH COURT.

Wallace and Madhavan Nair, JJ.
13th November, 1923. — *C. R. P. No. 771 of 1923.*

Madras Estates Land Act, Ss. 3 (2) (*d*) *and* 8, *Exception—Inam—Surrender by ryot—If an "acquisition" within the meaning of the exception to S.* 8*—Lands surrendered if no longer an estate.*

Their Lordships referred to a Full Bench the question whether in the case of an inam falling within S. 3 (2) (d) of the Madras Estates Land Act surrender by a ryot is acquisition within the meaning of the exception to S. 8 so as to take the lands in respect of which the surrender is made out of the category of an estate.

The effect of Ss. 3 (2) (d), 3 (7), 6 (2), 8 (4) and exception considered. 38 Mad. 608, 843, 891 ; 45 Mad. 47 referred to.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Petitioners.

S. Varadachariar and *V. Govindarajachari* for Respondent.

T. S. V

Venkatasubba Rao and Madhavan Nair, JJ. *17th November, 1925.* — *C. M. P. No.* 1015 *of* 1925.

Civil Procedure Code, Ss. 94, 136 *and O.* 39, *R.* 2 (3)—*Injunction order—Contempt of Court—Disobedience—Punishment—How to be carried out.*

The procedure by way of contempt under O. 39, R. 2 (3) applies to disobedience of all injunctions issued under S. 94, Civil Procedure Code, and is not confined merely to injunctions issued under O. 39, Rr. 1 and 2. 7 L. W. 328 ; 42 All. [illegible]8 followed.

In a case where an injunction order issued by a Judge of the High Court sitting on the Appellate Side was disobeyed by the respondent residing in the mofussil, as the execution chapter is not applicable, the warrants of arrest and attachment should be issued to the District Court asking it to proceed under S. 136, Civil Procedure Code.

Quaere : Whether S. 136 may not itself apply, as the High Court on its Appellate Side has jurisdiction over the whole Presidency ?

B. Sitarama Rao and *S. R. Muthuswami Iyer* for Petitioner.

T. M. Krishnaswami Aiyar for Respondents.

T. S. V.

Devadoss and Waller, JJ. *20th November, 1925.* — *L. P. A. No.* 157 *of* 1924.

Civil Procedure Code, O. 21, *Rr.* 58, 63—*Money decree—Execution sale—Claim petition by mortgagee decree-holder—*

Dismissal of petition after directing claim to be notified—Effect of order—Suit for possession—Lis pendens

The plaintiffs brought to sale certain immoveable properties in execution of a money decree. The defendants who had by that time obtained a preliminary mortgage decree against the same put in a claim petition praying either that the claim might be allowed or the same intimated to the intending bidders. The Court passed an order " Claim will be notified. Petition dismissed." The properties were sold and purchased by the plaintiffs who obtained symbolical possession. Subsequently the defendants got their preliminary decree made absolute, and the properties were purchased by themselves and possession obtained. In a suit for possession by the defendants, *held,* (1) the order on the claim petition being one adverse to the defendants and not having been set aside within a year, their rights under the mortgage decree could not be availed of as against the plaintiffs. 41 Mad. 985 applied ; 41 M. L. J. 198 ; 44 M. L. J. 141 ; 43 M. L. J. 467 ; 86 I. C. 233 referred to ; and

(2) the plaintiffs' rights were not affected by *lis pendens* by reason of the final decree proceedings in the mortgage suit.

B. Sitarama Rao and *K. Srinivasa Rao* for Appellant.

B. Somayya for Respondent

T. S. V

Devadoss and Wallace, JJ.
24th November, 1925. } *C. M. A. No.* 295 *of* 1923.

Madras Hereditary Village Offices Act (III of 1895), *S.* 21—*Jurisdiction—Civil Court—Service inam lands—Suit for possession—Claim not based as emoluments of office.*

A suit for possession of service *inam* lands based on an act of trespass or of a tenant holding over and not claiming the lands as the emoluments of an office is cognizable by a Civil Court, and is not barred by S. 21 of Madras Act III of 1895. 30 Mad. 126 ; 33 Mad. 208, 231 ; (1917) M. W. N. 7 ; 41 M. L. J. 372 referred to.

V. Ramadoss and *V. Krishna Mohan* for Appellant.

V. S. Narasimhachari for Respondent.

T. S. V.

PRIVY COUNCIL.

Petition for Special Leave to Appeal.

CORAM : *Lord Dunedin, Lord Wrenbury* and *Sir John Edge.*

27th October.—*Natha Singh* v. *Amir Shah.* (Lahore—Appeal No. 29 of 1925).

The appellant sued for specific performance of a contract by which the respondent on the 28th March, 1918, agreed to sell him a certain land ; and the appeal turned on the question whether that contract was, as contended by the respondent, and held by the High Court on appeal, superseded by another of the 16th April, 1918.

L. de Gruyther, K. C. and *W. Wallach* for Appellant.

Sir G. Lowndes, K. C. and *B. Dube* for Respondent.

Appeal dismissed.

Appeals.

CORAM : *Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali* and *Lord Salvesen.*

5th and 6th Nov.—*Bahadur Singh* v. *Hukum Chand and others.* (Patna—Appeal No. 36 of 1924).

These are consolidated cross-appeals from members of the two rival sects of Jains—Digambara and Swetambara—relative to the right to worship in certain Tonks and temples, each sect claiming the right to the exclusion of the other, by virtue of dedication and custom. The question has also been raised by the respondents whether a declaration, claimed by the appellant, of such right, can be made under section 42, Specific Relief Act.

L. de Gruyther, K. C., Sir G. Lowndes, K. C. and *B. Dube* for Appellant.

A. M. Dunne, K. C. and *E B. Raikes* for Respondents.

Judgment reserved.

6th Nov.—*Chiranjit Singh* v. *Har Sarup.* (Allahabad—Appeal No. 80 of 1923).

Consolidated cross-appeals.

In July, 1914, the appellant agreed to buy the late Jyotish Sarup deceased's " Markham Grant Estate" for Rs. 476,000, and paid Rs. 165,000 to account. Subsequently, the sale fell through, and the appellant instituted the present suit in October, 1917, claiming the refund of the Rs. 165,000, which he

alleged was in part payment of the purchase money. The vendor, on the other hand, considered it forfeited on the ground of its being earnest money. The appellant's appeal on this point is being met by the cross-appeal of the respondent on the question of limitation.

A. M. Dunne, K. C. and *B. Dube* for Appellant.

L. de Gruyther, K. C. and *J. M. Parekh* for Respondent.

Judgment reserved.

9th, 10th and 12th Nov.—*Maharaja of Vizianagram* v. *Collector of Godavari.* (Madras—Appeal No. 55 of 1924).

The appellant here contests the right of the Government to levy, under Madras Act III of 1905, penal assessment on certain land which was submerged by the River Godavari, and subsequently reformed, and is claimed by him as an accretion to his lanka of Perugu, and also as a reformation *in situ* of the Pedda lanka, forming part of his village of Kotipalli. The Government contends that it is a reformation *in situ* of the Government village of Sanapalli.

W. H. Upjohn, K. C., K.V.L. Narasimham and *P. V. Subba Rao* for Appellant.

L. de Gruyther, K. C. and *K. Brown* for Respondent.

The hearing is proceeding.

A. de M.

HIGH COURT.

Devadoss and Wallace, JJ.
24th November, 1925. — *C. M. A. No.* 106 *of* 1925.

Civil Procedure Code, S. 145 *and O.* 21, *R.* 2—*Surety for judgment-debtor—Plea that decree had been satisfied for payment—No satisfaction recorded—Plea not open.*

A person who stands surety for a judgment-debtor is not a party to the decree, but is still competent to apply under O. 21, R. 2 for recording satisfaction of the decree. Where no satisfaction has been entered up under O. 21, R. 2 and such surety is proceeded against, he cannot set up the plea that the decree has been satisfied by payment. 67 I.C. 885 followed; 34 Mad. 659; 40 Mad. 296 distd.; 43 Mad. 325 referred to.

B. Somayya for Appellant.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ. 25th November, 1925. — *L. P. A. No. 61 of 1925.*

Malabar Law—Maintenance—Karar—Alteration of—Allotment to tavazhies—Suit by some junior members alone—Maintainability—Proper frame of suit—Amendment—Second Appeal.

In a Malabar *tarwad* consisting of a large number of members, *karars* were entered into in 1886, by which properties were allotted to the several *tavazhies* for maintenance. There was an express recital that the arrangement was to remain in force only during the lifetime of the then *Karnavan*. Even after his death the same arrangements continued and more than thirty years later, some junior members of one of the *tavazhies* sued the *Karnavan* of the *tarwad* for maintenance. *Held*, (1) though the *karar* of 1886 ceased to have legal effect on the death of the then *Karnavan* it was open to the succeeding *Karnavans* to keep the same arrangements in force or alter them according to the circumstances, but if they were so kept in force, a *Karnavan* could set aside existing arrangements in favour of one branch only after substituting other suitable arrangements. 18 I. C. 234 referred to; (2) in such a suit for maintenance, the *thavazhi Karnavans* were all necessary parties and the entire *tarwad* should be properly represented, for it is only then that the *Karnavan* can make the necessary changes in the maintenance allotments in view of the change in circumstances. In a proper case the plaint can be allowed to be amended even in second appeal impleading all the necessary parties.

K. P. M. Menon and *B. Pocker* for Appellants.

T. S. Viswanatha Aiyar and *V. P. Karunakaran Nambiar* for Respondents.

T. S. V.

Waller and Madhavan Nair, JJ. 25th November, 1925. — *C. M. A. No. 207 of 1923.*

Civil Procedure Code, S. 47—Execution of decree—Disputes between rival decree-holders—Order if appealable.

Where in proceedings relating to the execution of a decree, disputes arise between persons who occupy the position of rival decree-holders, but in which the judgment-debtor is not interested, an order passed by the executing Court relating to

such matters does not fall under S. 47, Civil Procedure Code and is not appealable.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

K. Ramanath Shenai and *K. S. Desikan* for Respondent.

T. S. V.

Ramesam, J.
1st December, 1925. } *S. A. No.* 198 *of* 1925.

Auction purchaser—Title of—Decree obtained against alleged legal representatives of debtor—Decree not obtained against assets in their hands—Sale in execution and purchase by stranger—Third party establishing title as true heir-at-law of debtor—Suit to recover possession from auction purchaser—Rights of parties.

Certain creditors of one *K* sued two sisters of his and a sister's son after the death of *K* and after the death of his son *L* who survived him, on foot of a promissory note executed in their favour by *K* and obtained a decree. Subsequently certain agnatic relations of *K* and *L* filed a suit against *K's* sister's son and certain other persons and succeeded in establishing their right as heirs-at-law to *L's* estate. The creditor's decree was executed and some lands belonging to *L's* estate were sold in Court auction. In a suit filed by the agnatic relations of *L* against the Court auction purchasers, *held*, (1) that the agnatic relations could recover possession; (2) that the decree obtained by the creditors against the sisters and sister's son of *K* is not binding on the rightful heirs, inasmuch as *K's* sisters and sister's son were impleaded merely as heirs and not as being in possession of any assets belonging to *L's* estate; and (3) that the doctrine of a decree *bona fide* obtained against wrong representatives being binding as against the right representatives of the estate cannot be extended to cases when the wrong representatives were not in possession of any assets belonging to the estate. 11 Mad. 408 and 36 M. L. J. 106 relied on. 29 M.L.J. 698 explained. 33 Mad. 6 distinguished. Case-law reviewed.

V. Govindarajachari for *A. Krishnaswami Aiyar* for Appellants.

V. S. Narasimhachar for Respondent.

T. S. V.

PRIVY COUNCIL.

12th, 13th and 23rd November.—*Maharaja of Vizianagram* v. *Secretary of State.*

Hearing continued and concluded; judgment reserved.

CORAM: *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

17th, 19th and 20th November.—*Maneckji P. Barucha and another* v. *Wadilal Sarabai & Co. and Ghia* (Bombay—Appeal No. 125 of 1924).

The appellants, who are share-brokers in Bombay, sued the respondents, also share-brokers, for the return of the scrip and blank transfers relative to 104 shares in Alcock, Ashdown & Co., which they alleged the latter obtained by a fraudulent trick in April, 1920, from an intermediate dealer, Ghora, whose cheque for Rs. 154,800, price of the same, was dishonoured by the Bank. The respondents contended that the appellants had no equity enforceable against them, and that the documents mentioned were not "goods" within the meaning of sections 76, 78 and 121 of the Contract Act (IX of 1872). The Trial Judge, Kajiji, J., had decreed the suit, but his judgment was reversed on appeal by Macleod, C. J. and Crump, J.

A. C. Clauson, K.C., E. B. Raikes and *Johnston* for Appellants.

Sir J. Simon, K.C., Sir G. Lowndes, K.C., and *B. Dube* for Respondents.

Judgment reserved.

CORAM: *Lord Dunedin, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

20th November.—*Maung Kan* v. *King-Emperor* (Rangoon).

The petitioner was convicted and sentenced to death on the 11th May last by the Sessions Judge, Rangoon (whose judgment was affirmed on appeal) for the murder of Maung Myat Sein on the evening of the 5th February in the course of an "ahlu" (charity show) in Pyndwingon village. He contended that, as the deceased died in the course of a free fight which

he had with him, his offence was at most that of culpable homicide not amounting to murder, and he now prayed for special leave to appeal, alleging that "grave and substantial injustice" had been caused to him at the trial by—

(*a*) the witnesses selected for the prosecution, *e.g.*, the deceased's father, being persons naturally biassed against him ;

(*b*) the Sessions Judge neither referring to, nor admitting in evidence, the deposition of the deceased's father recorded before the committing Magistrate, which was contradictory of his evidence at the trial ;

(*c*) neither the Magistrate nor the Sessions Judge questioning him, the petitioner, as required by S. 342, Criminal Procedure Code, so as to enable him to explain the circumstances appearing in evidence against him ;

(*d*) the High Court on appeal treating as immaterial the deceased's father's evidence being coloured by his knowledge of the medical evidence as to the deceased's injuries.

G. Saunders for Petitioner.

K. Brown for Respondent.

Dismissed.

CORAM : *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

24th November.—*Chandar S. Baksh Singh and another* v. *Mst. Raj Kunwar* (Allahabad—Appeal No. 88 of 1923).

The respondent claimed from her brother and the widow of her deceased brother (appellants) possession of certain mahals in 8 villages in the Fatehpur district, Agra ; and her suit, dismissed by the Subordinate Judge, Cawnpore, was decreed by the High Court on appeal. She alleged that Appellant 1 had been adopted by her uncle, and the Appellant 2's husband (her deceased brother) having died in the lifetime of her father, she was entitled to succeed to her father's estate by survivorship. In defence the adoption of Appellant 1 was denied, and it was pleaded that, even if he had been adopted by his uncle, as all the parties were members of a joint Hindu family, he was entitled to take the estate by survivorship ; further, that the respondent's father belonged to the caste of the Bais Thakurs of Oudh, amongst whom, and more particularly in the family

custom excluded daughters from inheriting their father's estate.

L. de Gruyther, K.C. and *W. Wallach* for Appellants.

Sir G. Lowndes, K.C. and *B. Dube* for Respondents.

The hearing is proceeding.

A. de M.

HIGH COURT.

Ramesam, J.
17th November, 1925. } *S. A. No.* 814 *of* 1923.

Hindu Law—Widow—Gift by—Remote reversioner attesting and consenting not to dispute its validity—Suit to declare its invalidity—Estoppel—Immediate reversioner getting possession after declaring gift invalid—Effect of.

A remote reversioner who attested a gift by a Hindu widow to her brother and passed a letter of consent not to dispute the validity of the gift, the immediate reversioner being the mother of the last male holder, is precluded from suing for a declaration of its invalidity and no decree can be passed in his favour merely because prior to such decree the widow happened to die and the immediate reversioner, the mother of the last male holder sued for and obtained possession of the properties on the ground of the gift being invalid and in no way binding on the reversioner. 42 Mad. 523 (P. C.) applied and 45 All. 339 (F. B.) followed.

Ch. Raghava Rao for Appellant.

Dr. S. Swaminadhan for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ.
18th November, 1925. } *C. M. A. No.* 318 *of* 1923.

Provincial Insolvency Act (*V of* 1920), *S.* 75*—Person aggrieved—Alienee from insolvent—If entitled to appeal against order of adjudication.*

An alienee from the insolvent whose alienation is the alleged act of insolvency is not a necessary party to a creditor's petition to have the debtor adjudged an insolvent; and against an order adjudging the debtor an insolvent, the alienee is not

entitled to appeal as a person aggrieved within S. 75 of the Provincial Insolvency Act.

V. S. Narasimhachariar for Appellants.

Ch. Raghava Rao for Respondent.

T. S. V.

Devadoss and Waller, JJ. *20th November*, 1925. — *L. P. A. No.* 100 *of* 1924.

Malabar Law—Moplahs—Custom—Gift by a Moplah to his mother and children constituting them as tarwad—Validity of.

A Moplah of Calicut following Muhammadan Law made a gift of certain property in favour of his mother to be enjoyed as *tarwad* property by herself and her children present and future, and to perform certain ceremonies out of the income without power of alienation or partition and to be managed by the seniormost male member for the time being. The children of the donor filed a suit for a declaration that the gift was not valid and binding on them.

Held, upholding the view of *Krishnan, J.* in S. A. No. 860 of 1921, the gift was invalid, as it was not open to a Moplah following Muhammadan Law to create by a deed a *tarwad* following Marumakkathayam Law and transfer property to such *tarwad* as it is opposed to the *Tagore case*. The gift cannot operate at all in favour of the donees as the primary intention of the donor was to create *tarwad* property. 11 C. 684 (P. C.) followed.

K. P. M. Menon, K. Krishna Menon and *P. Govinda Menon* for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

[END OF VOLUME XLIX]